S. Hrg. 98-1041

S. 2480 — S. 2663

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2480

TO DECLARE THAT THE MINERAL RIGHTS IN CERTAIN LANDS ACQUIRED BY THE UNITED STATES IN CONNECTION WITH THE GARRISON DAM AND RESERVOIR PROJECT ARE HELD IN TRUST FOR THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, AND FOR OTHER PURPOSES

AND

S. 2663

PERTAINING TO THE INHERITANCE OF TRUST OR RESTRICTED LAND ON THE LAKE TRAVERSE INDIAN RESERVATION, NORTH DAKOTA AND SOUTH DAKOTA, AND FOR OTHER PURPOSES

JUNE 21, 1984

WASHINGTON, DC

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PAUL ALEXANDER, *Staff Director*

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S. 2480 — S. 2663

JUNE 21, 1984

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10:15 a.m., in room 485, Russell Senate Office Building, Hon. Mark Andrews (chairman of the committee) presiding.

Present: Senators Andrews and Burdick.

Staff present: Paul Alexander, staff director; Peter S. Taylor, general counsel; Max Richtman, minority staff director; and Lynn Toledo, secretary.

Senator ANDREWS. The hearing will come to order.

Good morning. My apologies for being late. We were in session until 4 o'clock this morning. That did not bother anything, but I had a 9:30 meeting this morning on military warranties which we just passed last night; and meeting with a number of people, we did not get out of that one until we were late here.

Our hearing concerns two bills involving my home State of North Dakota. The first bill, S. 2480, was introduced on behalf of the Three Affiliated Tribes by Senator Burdick and myself. It is designed to restore mineral rights to the tribes in what is known as the corps taking area in Lake Sakakawea behind Garrison Dam. Approximately 154,000 acres of lake bottom are affected.

A number of complex issues have been raised with this bill which will need to be resolved. Some of these issues, however, concern matters not related to mineral restoration, but are jurisdictional matters between the Fort Berthold Indians and their non-Indian neighbors.

While today's hearing will focus on issues pertinent to S. 2480, let me assure everyone that these other matters have been and continue to be of concern to me. Our committee staff has been to the State three times over the past year to meet with folks in the area about this bill, as well as the other issues. These meetings will continue and I hope to see the kind of progress that will produce solutions.

The other bill we will consider today is S. 2663 which was introduced by Senator Abdnor and Senator Pressler. It provides a specific inheritance code for the Lake Traverse Indian Reservation, also located in part of North Dakota.

Before we proceed with our witnesses, without objection, I will place a copy of S. 2480 and S. 2663 in the hearing record.

[The bills follow:]

II

98TH CONGRESS
2D SESSION

S. 2480

To declare that the mineral rights in certain lands acquired by the United States in connection with the Garrison Dam and Reservoir Project are held in trust for the Three Affiliated Tribes of the Fort Berthold Reservation, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 27 (legislative day, MARCH 26), 1984

Mr. ANDREWS (for himself and Mr. BURDICK) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

To declare that the mineral rights in certain lands acquired by the United States in connection with the Garrison Dam and Reservoir Project are held in trust for the Three Affiliated Tribes of the Fort Berthold Reservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Fort Berthold Reservation Mineral Restoration Act".

SEC. 2. (a) Subject to the provisions of this Act, all mineral interests in the lands located within the exterior boundaries of the Fort Berthold Indian Reservation which—

(1) were acquired by the United States for the construction, operation, or maintenance of the Garrison Dam and Reservoir Project, and

(2) are not described in subsection (b),

are hereby declared to be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Reservation.

(b) The provisions of subsection (a) shall not apply with respect to—

(1) lands located in Township 152 North or Township 151 North of Range 93 West of the 5th principal meridian which lie east of the former Missouri River, and

(2) lands located in any of the following townships: Township 152 North and Township 151 North of Range 92 West of the 5th principal meridian; Township 152 North and Township 151 North of Range 91 West of the 5th principal meridian; Township 152 North and Township 151 North of Range 90 West of the 5th principal meridian; Township 152 North, Township 151 North, Township 150 North, and Township 149 North of Range 89 West of the 5th principal meridian; Township 152 North, Township 151 North, Township 150 North, and Township 149 North of Range 88 West of the 5th principal meridian;

and Township 152 North, Township 151 North, Township 150 North, and Township 149 North of Range 87 West of the 5th principal meridian.

SEC. 3. Any exploration, development, production, or extraction of minerals conducted with respect to any mineral interest described in section 2(a) shall be conducted in accordance with such regulations as the Secretary of the Army shall prescribe in order to—

(1) protect the Garrison Dam and Reservoir, or

(2) carry out the purposes of the Garrison Dam and Reservoir Project.

SEC. 4. (a) Nothing in this Act shall deprive any person (other than the United States) of any right, interest, or claim which such person may have in any minerals prior to the enactment of this Act.

(b) The United States may renew or extend any lease, license, permit, or contract with respect to any mineral interest described in section 2(a) after the date of enactment of this Act only if—

(1) the governing body of the Three Affiliated Tribes of the Fort Berthold Reservation approves of such renewal or extension, or

(2) the holder of such lease, license, or permit or a party to such contract (other than the United States) had the right to renew or extend such lease, license,

permit, or contract prior to the date of enactment of this Act and such holder or party exercises such right of renewal or extension.

(c) All rentals, royalties, and other payments with respect to any mineral interest described in section 2(a) accruing to the United States after the date of enactment of this Act shall be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Reservation.

SEC. 5. Public Law 87-695 is amended—

(1) by striking out "such former Indian land" and inserting in lieu thereof "such land",

(2) by striking out "Subject" in the first sentence and inserting in lieu thereof "That (a) subject", and

(3) by adding at the end thereof the following new subsection:

"(b) Subsection (a) shall not apply with respect to any lands described in section 2(b) of the Fort Berthold Reservation Mineral Restoration Act.".

SEC. 6. (a) The Secretary of the Army and the Secretary of the Interior may enter into agreements for the transfer to the United States of any land located near the Garrison Dam and Reservoir Project which is held in trust for the benefit of the Three Affiliated Tribes of the Fort Berthold

Reservation or any individual Indian if such agreement is approved—

(1) in the case of land held for the benefit of such tribes, by the governing body of such tribes, or

(2) in the case of land held for the benefit of any individual Indian, by the individual or individuals holding a majority of the beneficial interest in such land.

Any land transferred to the United States under the preceding sentence shall be treated as land acquired for the operation and maintenance of the Garrison Dam and Reservoir Project.

(b) The Secretary of the Army and the Secretary of the Interior may enter into agreements under which any land acquired by the United States for the construction, maintenance, or operation of the Garrison Dam and Reservoir Project that is no longer needed for such purposes is declared to be held by the United States in trust for the benefit of the Three Affiliated Tribes of the Fort Berthold Reservation.

SEC. 7. The provisions of this Act, and of any agreement entered into under section 6, shall not be taken into account under section 2 of title I of the Second Deficiency Appropriation Act, fiscal year 1935 (25 U.S.C. 475a) or section 2 of the Act of August 13, 1946 (60 Stat. 1050) for purposes of determining any offset or counterclaim.

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II

98TH CONGRESS
2D SESSION

S. 2663

Pertaining to the inheritance of trust or restricted land on the Lake Traverse Indian Reservation, North Dakota and South Dakota, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 10 (legislative day, APRIL 30), 1984

Mr. ABDNOR (for himself and Mr. PRESSLER) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

Pertaining to the inheritance of trust or restricted land on the Lake Traverse Indian Reservation, North Dakota and South Dakota, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to the extent that the laws of devise, descent and distribution of the State of North Dakota or the State of South Dakota are inconsistent with this Act or to the extent that the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), is inconsistent with this Act, the provisions of this Act shall govern the right to inherit trust or restricted land located within such States and within the original exterior boundaries of the Lake Traverse Indian Reservation (hereinafter the "reservation") as described in article III of the Treaty of February 19, 1867 (15 Stat. 505).

SEC. 2. (a) Except as provided in section 4 of this Act, only the Sisseton-Wahpeton Sioux Tribe of North Dakota and South Dakota (hereinafter the "tribe") or persons who are enrolled members of the tribe shall be entitled to receive by devise or descent any interest in trust or restricted land within the reservation.

(b) The provisions of this Act shall apply only to estates of decedents whose deaths occur on or after the date of enactment of this Act.

SEC. 3. (a) Whenever any person dies possessed of any interest in trust or restricted land within the reservation and the trust or restricted land has not been devised by a will approved by the Secretary of the Interior pursuant to section 2 of the Act of June 25, 1910 (36 Stat. 856), as amended (25 U.S.C. 373), or the trust or restricted land has not been devised by a will which is consistent with the provisions of section 2 of this Act, such interest shall descend to the following persons: *Provided,* That such persons are eligible heirs under section 2 and 5 of this Act:

(1) one-half of the interest shall descend to the surviving spouse and the other one-half shall descend in equal shares to the children of the decedent and to

the issue of any deceased child of the decedent by right of representation;

(2) if there is no surviving spouse, the interest shall descend in equal shares to the children of the decedent and to the issue of any deceased child of the decedent by right of representation;

(3) if there are no surviving children or issue of any child, the interest shall descend to the surviving spouse;

(4) if there is no surviving spouse and no surviving children or issue of any child, the interest shall descend to the surviving parents or parent of the decedent;

(5) if there is no surviving spouse, and no surviving children or issue of any child, and no surviving parent, the interest shall descend equally to the brothers and sisters of the decedent; and

(6) if there is no surviving spouse, and no surviving children or issue of any child, no surviving parent, and no surviving brothers or sisters, the interest shall escheat to the tribe and title to such escheated interest shall be taken in the name of the United States in trust for the tribe.

(b) As used in this section, the words "children" and "issue" include children adopted under the laws of a State or foreign country, or in accordance with the laws of an Indian tribe, children of unwed parents where the Secretary of the Interior determines that paternity has been acknowledged or established under the laws of a State or foreign country or in accordance with the laws of an Indian tribe, and children of parents whose parental rights have been terminated pursuant to lawful authority.

(c) As used in this section, the word "parent" shall not include the parent of any child with respect to whom such parent's parental rights have been voluntarily terminated pursuant to lawful authority.

SEC. 4. (a) Notwithstanding the provisions of section 2 and subject to the provisions of section 5 of this Act, the nonmember of the tribe surviving spouse, nonmember surviving children and the nonmember surviving issue of any children of any person who dies possessed of any interest in trust or restricted land within the reservation, shall be entitled to take only a life estate in any interest in such trust or restricted land devised by a will approved by the Secretary of the Interior pursuant to section 2 of the Act of June 25, 1910 (36 Stat. 856), as amended (25 U.S.C. 373).

(b) Notwithstanding the provisions of sections 2 and 3 and subject to the provisions of section 5 of this Act, wherever any person dies possessed of any interest in trust or restricted land within the reservation and the trust or restricted land has not been devised by a will approved by the Secretary of the Interior pursuant to section 2 of the Act of June 25, 1910 (36 Stat. 856), as amended (25 U.S.C. 373), the nonmember of the tribe surviving spouse, nonmember children, and the nonmember issue of any children of the decedent shall be entitled to take only a life estate in any interest provided in section 3 of this Act.

(c) At the time that the Secretary of the Interior approves any life estate for a surviving spouse, children, or the issue of any children of a decedent, the trust or restricted land subject to such life estate thereafter shall be held in trust for the appropriate heir under section 3 of this Act or the provisions of any will approved by the Secretary pursuant to section 2 of the Act of June 25, 1910 (36 Stat. 856), as amended (25 U.S.C. 373).

(d) The provisions of subsections (a) and (b) of this section notwithstanding, unless a devise of trust or restricted land otherwise provides, any life estate provided for in this Act shall be subject to the following conditions, restrictions and limitations:

(1) whenever the life tenant is a sole heir, such life tenant shall be entitled to determine the use and to receive any income from the lease or other use of the land;

(2) whenever an enrolled member of the tribe dies survived by a nonmember spouse and nonmember children, such spouse shall be entitled to one-half of the income from the lease or other use of the land and such children shall be entitled to the other one-half, and the same division shall apply to any land use determination;

(3) whenever an enrolled member of the tribe dies survived by a nonmember spouse, nonmember children, and nomember issue of any deceased child, such spouse shall be entitled to one-half of the income from the lease or other use of the land and such children and issue of children shall be entitled to equal shares of the other one-half, and the same division shall apply to any land use determination;

(4) whenever an enrolled member of the tribe dies survived by nonmember children, such children shall be entitled equally to determine the use and to receive any income from the lease or other use of the land;

(5) whenever an enrolled member of the tribe dies survived by nonmember children and nonmember issue of any deceased child, such children and issue of children shall be entitled equally to determine the use and to receive any income from the lease or other use of the land; and

(6) whenever an enrolled member of the tribe dies survived by nonmember issue of the children of such member, such issue shall be entitled equally to determine the use and to receive any income from the lease or other use of the land.

For the purposes of this subsection, any children or the issue of any children of an enrolled member of the tribe born after the death of such member shall have the same rights as any children or the issue of any children who survive such member.

SEC. 5. Notwithstanding any other provision of this Act, no person shall be entitled by devise or descent to take any interest, including any interest in a life estate under section 4 of this Act, less than two and one-half acres in trust or restricted land within the reservation. Any interest less than two and one-half acres of a devisee or interstate distributee of a decedent under section 3 of this Act, shall escheat to the tribe and title to such escheated interest shall be taken in the name of the United States in trust for the tribe: *Provided*, That the provisions of this section shall not be applicable to the devise or descent of any interest in trust or restricted land located within a municipality.

SEC. 6. If a decedent has devised an interest in trust or restricted land within the reservation to a person prohibited under section 2 of this Act from acquiring an interest in such trust or restricted land, the interest in such land shall escheat to the tribe and title to such escheated interest shall be taken in the name of the United States in trust for the tribe: *Provided,* That any interest escheated to the tribe shall be subject to a life estate in the devisee as provided for under section 4(a) of this Act.

SEC. 7. (a) Whenever the tribe or an enrolled heir member of the tribe holds at least a 50 per centum undivided interest in trust or restricted land within the reservation, the Secretary of the Interior, upon the request of the tribe or the enrolled heir member of the tribe and without the necessity of obtaining the consent of any of the other heirs, shall partition the allotment or part thereof: *Provided,* That whenever the tribe requests partition, the Secretary shall partition the allotment to the advantage of the heirs, except that any partition shall assure that the tribe retains one contiguous divided interest in the land unless the tribe agrees to a different division: *Provided further,* That whenever an enrolled heir member of the tribe requests partition, the Secretary shall partition the allotment to the advantage of the person requesting the partition.

(b) The provisions of any law to the contrary notwithstanding, the Secretary of the Interior, upon the request of the tribe or an enrolled heir member of the tribe, shall approve partition of trust or restricted land within the reservation whenever the partitioned interest in the land of the tribe or the enrolled heir member of the tribe is at least two and one-half acres and the owners of more than a 50 per centum undivided interest in the trust or restricted land to be partitioned consent to the partition.

(c) Whenever the Secretary partitions land under this section, he shall issue a new trust patent, in accordance with applicable law, for the lands set apart for the tribe or the enrolled heir member of the tribe, as the case may be, the trust period to terminate in accordance with the terms of the original patent or order of extension of the trust period set out in said patent or in accordance with the provisions of law governing the sale of alloted lands.

SEC. 8. (a) The tribe shall have authority to exercise powers of eminent domain, over trust or restricted lands within the reservation, to eliminate fractional heirship interests in trust or restricted land, to consolidate tribal interests in land, to develop agriculture, and to condemn for other public uses any interest in trust or restricted land. Upon the request of the tribe, the interest acquired thereafter shall be held by the United States in trust for the tribe: *Provided*, That the tribe has made just compensation under tribal judicial process and in accordance with a code of tribal eminent domain laws approved by the Secretary of the Interior.

(b) Subject to the right of judicial review provided in subsection (c) of this section, a final judgment of the tribal court in favor of the tribe in a condemnation action is conclusive as to the title of the tribe, in and to the interest in the trust or restricted land described in said judgment, against any and all parties in said action, including unknown defendants, and against any and all persons claiming from, through or under such a party by title accruing after the filing of the judgment by the clerk of the tribal court or after the filing of a notice of the pendency of the action with an official designated for that purpose under the eminent domain laws of the tribe.

(c) Any party aggrieved by the condemnation findings and determination of the tribal court may seek judicial review thereof in the United States district court for the district within which the affected interest in land is located. Judicial review shall be taken by filing a notice of appeal with the clerk of the tribal court and district court within thirty days of the date of the entry of the judgment or order of condemnation appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days of the date on which the first notice of appeal was filed. Any appeal taken under this Act shall be limited to a review of whether the tribal court order or judgment of condemnation is in accordance with the provisions of this Act, any tribal eminent domain laws and the provisions of title II of the Act of April 11, 1968 (82 Stat. 77).

(d) In any tribal court or United States district court proceeding pursuant to subsections (a) or (d) of this section, notice of the proceeding shall be served upon the United States. The United States shall not be an indispensable party in such proceeding.

SEC. 9. The Secretary of the Interior is authorized, with any available funds provided by the United States or the tribe, to acquire by purchase, exchange, or condemnation any land or interest in trust or restricted land within the reservation for the purpose of eliminating fractional heirship interests in land, consolidating tribal interests in land, and developing tribal agriculture or commercial enterprises. After such acquisition, said lands or interests in lands shall be held by the United States in trust for the tribe.

SEC. 10. Whenever the tribe imposes a tax against the estate of any person who dies possessed of any interest in trust or restricted land within the reservation, the Secretary of the Interior shall collect the tax out of the estate as part of the probate proceeding. The amount of the tax collected shall be payable to the tribe.

SEC. 11. (a) If it shall appear from the records of the United States that the rightful owner of any property in the possession, custody, or control of the United States, including trust or restricted land with the reservation, either (a) shall have been or shall be unknown for seven consecutive years; or (b) shall have made no claim to or shall make no claim to such property for seven consecutive years, and the rightful owner is an enrolled member of the tribe, or there is substantial evidence that the rightful owner is likely to be eligible for enrollment in the tribe, or the rightful owner is an heir by devise or descent of an enrolled member of the tribe, or the property is a distribution of an award of the Indian Claims Commission or the United States Court of Claims, such property, together with all interest or other increments thereon, shall escheat to the tribe: *Provided*, That prior to any escheat of property to the tribe and within ninety days after the expiration of the aforesaid period of seven consecutive years, the agency of the United States which has in its possession, custody, or control, property which is or may be the property of an enrolled member of the tribe or of a person who is likely to be eligible for enrollment in the tribe, with due diligence shall undertake to locate the rightful owner of the property and restore said rightful owner to possession, custody or control of the property.

(b) As used in this section, the word "property" includes, but is not limited to, money, individual Indian money, postal savings deposits, bonds, notes, and anything of value of any nature whatsoever.

(c) The Secretary shall prepare and, on or before December 31 of each year, submit to the tribe a list of abandoned or unclaimed property under subsection (a) of this section of persons who are enrolled or eligible for enrollment in the tribe.

(d) Notwithstanding any other provisions of this Act, the provisions of this section shall apply to the rightful owner of any property abandoned or unclaimed for a period of seven consecutive years commencing on the day seven years prior to ninety days after the date of enactment of this Act.

SEC. 12. All lands or interests in land acquired by the United States for the tribe or an enrolled member of the tribe under authority of this Act shall be exempt from Federal, State, and other nontribal taxation.

SEC. 13. Within one hundred and twenty days after the date of enactment of this Act, the Secretary of the Interior shall send an explanation of the provisions of this Act to all persons who have any interest in trust or restricted land within the reservation.

SEC. 14. Wills executed prior to or within one hundred and twenty days after the date of enactment of this Act shall be effective, in the absence of compliance with the provisions of this Act, for a period not to exceed one hundred and eighty days after the date of enactment of this Act.

Senator **Andrews**. Today on our witness list, we have first my colleague, Senator Burdick. He was on the floor as late as I and probably will be along a little later. Fred Miller, as I understand, is going to submit a statement on behalf of Attorney General Wefald. We have that statement and it will appear in the record at this point.

[The prepared statement follows:]

Prepared Statement of Robert Wefald, Attorney General of the State of North Dakota

I am offering this written statement in my official capacity as an elected state official and as Attorney General for the State of North Dakota. I approach this bill with caution not because I object to the fundamental idea involved, but rather because I am very aware of the often sensitive nature of any change in the status quo with respect to any Indian reservation within the State of North Dakota. I have made an effort to understand and work with the tribal governments of North Dakota and I must say that our relationship with the Tribal Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation has developed nicely. I support the notion that all tribal governments in North Dakota need to be placed on a much more sound economic footing as I recognize that this is the key to a strong and successful tribal government which in turn is the key to building an ever better relationship between tribal governments and the State of North Dakota. To the extent this bill would restore minerals to the Three Affiliated Tribes and would therefore put them in a better financial position, I support this legislation.

I stated, however, that I approach this bill with caution. I believe the first subsection of Section 2(a) of this bill should be amended so that in fact it does nothing more than restore to the Three Affiliated Tribes minerals taken from the Three Affiliated Tribes or enrolled Indian members. It should not transfer from the federal government to the Three Affiliated Tribes any minerals acquired from the State of North Dakota and its political subdivisions, and any persons who were not enrolled members of the Three Affiliated Tribes. This subsection should be amended as follows: "(1) were acquired by the United States for the construction, operation, or maintenance of the Garrison Dam and Reservoir Project and which were acquired from the Three Affiliated Tribes or from enrolled members of the Three Affiliated Tribes."

There are minerals within the scope of this bill which were owned by people or entities other than the Three Affiliated Tribes and its enrolled members. To convey these minerals from the United States to the Three Affiliated Tribes would do more than "restore" to the Three Affiliated Tribes minerals taken from them.

There is no federal law of exploration, development, production, or extraction of minerals, rather such activity in each state is regulated by state law and procedures. The Industrial Commission of the State of North Dakota through its Oil and Gas Division is the state agency responsible for controlling all exploration, development, production, or extraction of oil and gas minerals. Section 3 of the bill purports to give this authority to the Secretary of the Army. While I would agree that the Secretary of the Army has the authority to protect the Garrison Dam and Reservoir and to carry out the purpose of the Garrison Dam and Reservoir Project, I do not believe that the Secretary of the Army has any authority whatsoever to regulate the exploration, development, production, or extraction of minerals anywhere within the State of North Dakota. Accordingly, an additional provision should be added to Section 3 as follows: "Insofar as such regulations are sufficient to protect the Garrison Dam and Reservoir and to carry out the purposes of the Garrison Dam and Reservoir Project, they shall not supersede the law and rules of the State of North Dakota with respect to the exploration, development, production, or extraction of minerals within or under the waters in the Garrison Reservoir."

Because the Garrison Reservoir is a rather large body of water and because many of the minerals restored to the Three Affiliated Tribes in this bill would be difficult to reach without going directly through the water of the Garrison Reservoir, it is important that the environmental concerns be regulated by the State of North Dakota. We believe that the potential environmental damage from a mishap involving actual drilling in the Garrison Reservoir itself would never be offset by any potential gain to be realized from the extraction of minerals that can only be reached by actual operation out in the waters of the Garrison Reservoir.

As to Section 6 of the bill authorizing the Secretary of the Army and the Secretary of the Interior to enter into agreements for the transfer of lands within the exterior boundary of the Fort Berthold Indian Reservation, my concerns are that this provision not include any such lands within the so-called Northeast Quadrant and that the Secretary of the Army and the Secretary of the Interior both be instructed not to enter into any such transfer agreement if it will adversely affect the management of the so-called "take area" managed under a long term contract by the North Dakota Game and Fish Department. Also, Section 6(b) should be specifically limited to any such unneeded lands within the exterior boundaries of the Fort Berthold Indian Reservation less the Northeast Quadrant. As this provision presently reads, any excess land associated with the Garrison Dam and Reservoir Project whether it is located within or without the exterior boundaries of the Fort Berthold Reservation would be capable of being conveyed to the Three Affiliated Tribes. To give the Three Affiliated Tribes land outside of the exterior boundaries of the Fort Berthold Indian Reservation would be a dramatic step well beyond simply "restoring" mineral rights to the Three Affiliated Tribes.

I am pleased that both Senator Andrews and Senator Burdick have seen fit to introduce this legislation which should, with the suggestions I have noted, help build a better economic base for the Three Affiliated Tribes. I applaud their concerns for these citizens of the State of North Dakota. I also am particularly pleased to see that the remarks of both Senator Andrews and Senator Burdick have been set forth in the Congressional Record for the Senate of March 27, 1984. Senator Andrews noted at S. 3234 of the Congressional Record that: Legitimate concerns have been raised that nothing in this legislation should have any effect on the question of water rights, fishing rights, access to the lake, or should effect the status quo with respect to the role of the State in regulating the exploitation and development of mineral resources underlying the lake. It is not our intention that this legislation should adversely affect the interests of any party on these issues."

Senator Burdick noted on page S. 3235 of the Congressional Record that: "This bill will not affect the question of water rights, fishing rights, access to the Lake, or the status quo with respect to the role of the North Dakota government in regulating the development of mineral resources underlying the lake."

I certainly hope that these limitations are clearly understood by the Congress, by the Three Affiliated Tribes, and by the State of North Dakota and its political subdivisions. A clear statement that the only intent of this bill is to restore to the Three Afflilated Tribes the minerals taken from them would be a very positive step in reassuring many people of the State of North Dakota who have raised concerns. I suggest that a statement of congressional intent to this effect be added to this bill.

Finally, we have mentioned several times the so-called Northeast Quadrant of the Fort Berthold Indian Reservation. This land has been defined in the bill. Until court action began which resulted in the *City of New Town* vs. *United States*, 454 F.2d 121 (8th Cir. 1972), residents in the Northeast Quadrant had no idea that they were living on the Fort Berthold Indian Reservation.

This land in the Northeast Quadrant was opened by the Congress early in the century and was homesteaded by the ancestors of many people who presently live in the Northeast Quadrant. The change in the status brought about by this court case has been a source of frustration to the people of the Northeast Quadrant. One word which sums all of these problems is "jurisdiction." Who has it? What is the extent of the jurisdiction (if any) of the Three Affiliated Tribes over the land and people of the Northeast Quadrant? These questions were created as a result of the actions taken by the Congress at the beginning of the century. The *City of New Town* case decided by the Eighth Circuit clearly pointed out that only Congress can solve these jurisdictional questions. Although jurisdiction is not related to, the subject of this bill and although I do not want to take any action to hold up this bill because of this question of jurisdiction, I do respectfully request on behalf of the citizens of North Dakota living in the Northeast Quadrant of the Fort Berthold Indian Reservation that the Congress through the United States Senate and through this Committee in particular hold a formal hearing. The Congress should initiate a complete and full investigation as to the question of jurisdiction in the Northeast Quadrant. The Congress, having completed such an investigation, should enact appropriate legislation to settle jurisdiction questions created by the homesteading on the Northeast Quadrant and the *City of New Town* case.

With the changes that I have recommended, which in my opinion will maintain the status quo and which will restore to the Three Affiliated Tribes minerals taken from the Three Affiliated Tribes and with the assurances given by Senator Andrews and Senator Burdick in the record, the Attorney General of the State of North Dakota supports this legislation.

I thank you for the opportunity to submit this statement to the Committee.

Senator ANDREWS. Next we have Ms. Alyce Spotted Bear, who is the chairwoman of the Three Affiliated Tribes Business Council at Fort Berthold. Madam Chairwoman, do you have a statement, and would you like to augment the statement? Or would you like to have it filed for the record as though given?

Ms. SPOTTED BEAR. I would like to have it filed for the record as given.

Senator ANDREWS. The prepared statement, in its entirety, will appear in the record at this point.

[The prepared statement follows:]

PREPARED STATEMENT OF ALYCE SPOTTED BEAR, CHAIRWOMAN, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION

Mr. Chairman, I would like to begin my statement, if I may, by asking to introduce into the record of this hearing a photograph. The subject of this photograph, which appeared in the Washington Post on May 21, 1948 is one which is usually an occasion for joy among Indian people: a signing ceremony in the Office of the Secretary of the Interior.

This picture, Mr. Chairman, tells a different story. It shows an Indian tribal leader covering his face to conceal that he is crying—the man is George Gillette and he was, in 1948, Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation. And he was crying because the signing ceremony captured in this photograph was, and remains, an event of great anguish to our people—the loss of 155,000 acres of our richest, heaviest populated Reservation lands for the construction of the Garrison Dam and Reservoir Project.

Chairman Gillette was quoted at the time this photograph was taken as saying: "Right now, the future does not look good to us." What he foresaw—and what in fact came true—was this:

Construction of the Garrison Project required the federal acquisition of 155,000 acres of our Reservation—not just one-quarter of our land-base, but the most fertile heartland of the Reservation;

The flooding of the Taking Area split our Reservation into five completely isolated segments. Four out of every five Fort Berthold households were forced to relocated, often many miles from their original homelands. Families which had lived together as close-knit communities were forced to scatter. To this day, only a single bridge crosses the length of the Garrison Reservoir, Lake Sakakawea, making communication and transportation among former neighbors a continuing burden; and

The Tribal economy was devastated by these dislocations 35 years ago, and is still far from recovery today. The exposed coal seams along the banks of the Missouri River, once ideal for our domestic heating needs, are submerged; the fertile bottom lands of the valley, once our breadbasket, today lie 100 feet underwater. The then-developing infrastructure which was making commercial activity on the Reservation possible, was literally washed away.

All of these impacts George Gillette could foresee. We are here today however, Mr. Chairman, to urge passage of legislation which will remedy a further, unnecessary injustice that no one at the time could predict.

When Congress authorized the Garrison Project, it conditioned the acquisition of Fort Berthold lands upon the reaching of an agreement on the terms of compensation between the Tribes and the Corps of Engineers. Such an agreement was in fact reached, and it was approved by Interior Secretary Krug as Trustee in the ceremony you see in the photograph. Although the Tribe always deeply opposed the Garrison Project, we were persuaded to approve this Agreement with the Corps of Engineers because it included, in addition to monetary compensation, a number of non-cash compensatory benefits of great importance to us. Article X of the Agreement permanently reserved to us the right to graze our livestock in the Taking Area between the taking line and the actual waterline of Lake Sakakawea. And Article XII expressly recognized our continued rights in the mineral interests within the Taking Area. We looked upon both of these provisions as essential elements of a Tribal economic-survival plan in view of the dislocations which were about to ensue.

The first bill introduced in Congress to provide for the taking of our land incorporated the terms of this Contract. But Congress rejected them. The non-monetary compensatory benefits were stripped from the legislation; instead, Congress increased the cash payment to $82 per acre. And it conditioned our receiving the payment upon our agreeing never to challenge the validity of the settlement in court.

The author of the original bill, Representative Lemke, was quoted at the time as saying of the 1949 Taking Act: "I do not consider it a just or moral settlement. We are again violating a treaty solemnly entered into with these tribes—a treaty in which we promised them never to disturb them again." And then, Representative Lemke added: "Unfortunately, the Indians have no choice. It is not a voluntary settlement."[1]

In fact that is true: with the Garrison Dam closed and the floodwaters on the rise, our members voted in the spring of 1950 to approve the Taking Act as the only means of guaranteeing some form of compensation. All we did have in hand were assurances from several senior members of the Congress that amendments to the Act, restoring our grazing and mineral rights, would be introduced and considered by Congress very quickly, once we approved the Act.

That was in 1950, Mr. Chairman. Amendments restoring our grazing and mineral rights were introduced in the Senate later that year,[2] but hearings were never held. Similar legislation was introduced again in 1951,[3] 1953,[4] 1954,[5] 1955,[6] 1956,[7] 1957,[8] 1959,[9] and 1961.[10] None of these bills became law.

During these years, other Missouri River Indian Reservations had portions of their lands acquired by the Corps of Engineers for flood-control projects as well. As the accompanying chart indicates, in each case either the affected tribes were permitted to retain grazing and mineral rights, or else those rights were subsequently restored. In each case as well, actual monetary compensation (even beyond non-cash compensatory benefits) substantially exceeded the $82 per acre that we received in exchange for all interests in our land. These acquisition agreements reflect the fact that shortly after the Garrison taking—around the same time that oil was discovered in the Williston area of North Dakota—the federal government changed its acquisition policy to permit the former owner to retain such interests where doing so would not interfere with the project's purpose. This shift of policy left the Three Affiliated Tribes the only ones who lost their mineral rights.

On March 26, 1982, the governing body of the Three Affiliated Tribes of the Fort Berthold Reservation unanimously voted to request that you, Chairman Andrews, and Senator Burdick and Congressman Dorgan, seek once again the enactment of this legislation by Congress.

Of course, the Tribe recognizes and respects the Army Corps of Engineers' regulatory authority over the Taking Area, and the legislation specifically states our understanding that any minerals development will, of necessity, be subordinated to the primacy of the Garrison itself.

In closing, Mr. Chairman, I want to refer back to those words that Chairman Gillette spoke: "Right now, the future does not look good to us."

Right now, Mr. Chairman, I have the privilege of expressing to you and to Senator Burdick the gratitude of my people for your willingness to sponsor this legislation and hold this hearing. We know that the fate of S. 2480 is right now in the hands of skillful legislators who feel as deeply about it as we do. Right now, of course, there could well be less than 20 working days left in this Congress, and that is certainly not much time in which to get a bill through the Senate and the House and signed into law. But we also recall the dispatch with which we acted at Congress' behest, 35 years ago, when flooding of our lands was imminent and completion of the Garrison Project was a matter of national urgency.

Our future today, Mr. Chairman, rests in no small part on your assistance in persuading the Congress that enactment of S. 2480 in this 98th Congress is a matter of national fairness. The Three Affiliated Tribes hopes for early passage of this legislation so that eventually, with this bill and other projects we are working on, our people will have reason to say that our future looks good to us once again.

Thank you.

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[1] 35 *North Dakota History: Journal of the Northern Plains,* "The Garrison Dam," p. 293 (1968).

[2] S. 3303, introduced by Senator Young March 24, 1950. This legislation would also have given the Tribe fishing rights, entitlement to electric power and other rights well beyong the scope of S. 2480 before us today.

[3] S. 1830; H.R. 4635.

[4] S. 74.

[5] S. 2812; H.R. 7282.

[6] S. 746 and S. 1956; H.R. 4292 and H.R. 5214.

[7] H.R. 9324.

[8] S. 1130; S. 1131.

[9] S. 557.

[10] S. 39; S. 41.

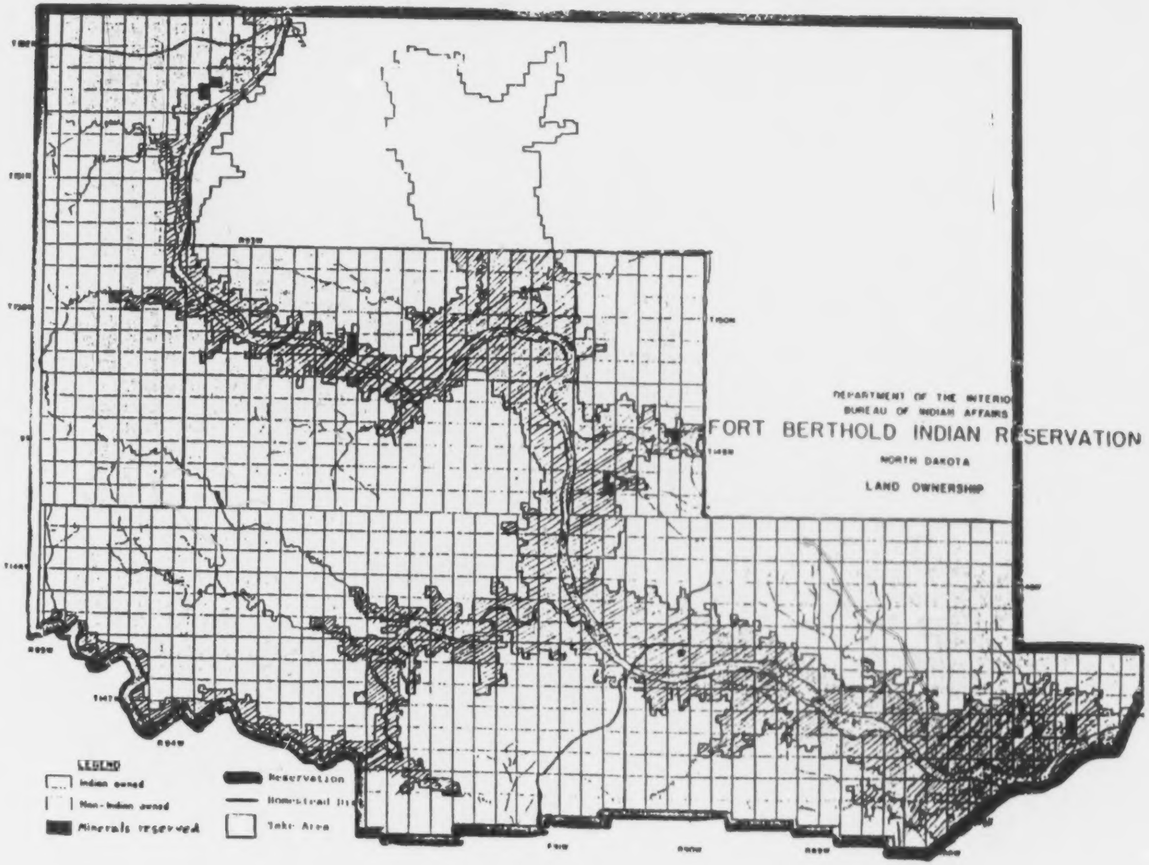
ATTACHMENTS

1. Photographs of then-Interior Secretary Krug approving Contract between the Three Affiliated Tribes and the Corps of Engineers.
2. Chart: Comparison of Fort Berthold's Treatment and That of Other Missouri River Tribes.
3. Map Showing Area of Mineral Restoration.
4. Map Showing Location of Fort Berthold and Other Missouri River Tribes. (Printed elsewhere in this hearing. See p. 43.)

COMPARISON OF FORT BERTHOLD'S TREATMENT AND THAT OF OTHER MISSOURI RIVER TRIBES

Tribe & Project	Statutory Authority (Year)	No. of Acres Taken	Extent of Taking	Compensation ($)
1. Lower Brule Sioux				
a. Big Bend Dam & Reservoir	76 Stat.698 (1962)	14,299	Tribe reserved all mineral interests except gravel and retained grazing privileges	$3,194,465
b. Fort Randall Dam and Reservoir	72 Stat.1773(1958)	7,997	All mineral interests revested in Tribe and grazing privileges retained	$976,523
2. Crow Creek Sioux				
a. Big Bend Dam & Reservoir	76 Stat.704 (1962)	6,284	Tribe reserved all mineral interests except gravel and retained grazing privileges	$4,366,802
b. Fort Randall Dam and Reservoir	72 Stat.1766(1958)	9,149	All mineral interests revested in Tribe and grazing privileges retained	$1,395,811 *
3. Standing Rock Sioux				
Oahe Dam & Reservoir	72 Stat.1762(1958)	55,994	Tribe reserved all mineral interests & retained grazing privileges	$12,211,553
4. Cheyenne River Sioux				
Oahe Dam & Reservoir	68 Stat.1191(1954)	104,420	Tribe reserved all mineral interests and grazing privileges	$10,544,014
5. Three Affiliated Tribes of the Fort Berthold Reservation				
Garrison Dam & Reservoir	63 Stat.1026(1949)	154,000	All interests taken	$12,605,625

* The Act authorized compensation equalling the difference between this sum and the award in the condemnation proceeding U.S. v. 9,148.69 Acres of Land and the Crow Creek Tribe of Sioux Indians.


DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
FORT BERTHOLD INDIAN RESERVATION
NORTH DAKOTA
LAND OWNERSHIP
LEGEND
Indian owned
Non-Indian owned
Minerals reserved
Reservation
Homestead lin
Take Area

Senator **Andrews**. Next we have Tillie Walker, the vice chairwoman of the Three Affiliated Tribes Business Council from Fort Berthold. Does she have a statement?

Let us have Carl Whitman, Tillie Walker, Alyce Spotted Bear, and Charlie Hobbs all come up to the table and I will ask you a couple of questions.

Now we are in the position of you having given your statements. Let me ask the questions; Madam Chairwoman, either you or your associates may answer.

In introducing this legislation, both Senator Burdick and myself stated that nothing in this legislation should have any effect on the question of water rights, fishing rights, access to the lake, or should affect the role of the State in regulating the development of mineral resources underlying the State. Is it also your understanding that nothing in this bill affects any of these rights or authorities as they currently exist?

TESTIMONY OF ALYCE SPOTTED BEAR, CHAIRWOMAN, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION, AND CHARLES A. HOBBS, ATTORNEY, OF HOBBS, STRAUS, DEAN & WILDER, WASHINGTON, DC

Ms. **Spotted Bear**. That is right.

Senator **Andrews**. Thank you.

Section III of this bill provides that mineral developments shall be conducted in accordance with such regulations as the Secretary of the Army shall prescribe. To what extent do the current regulations require adherence to the laws of the State? It is my understanding that the Attorney General's Office indicated that the corps does use State laws as a guide. Is this your understanding as well?

Mr. **Hobbs**. Are you addressing me, Senator?

Senator **Andrews**. As counsel, that probably falls in your field.

Mr. **Hobbs**. Your understanding is exactly the same as mine, but I have never seen documents one way or the other on that point.

Senator **Andrews**. But you have no knowledge to the contrary? Nor do your clients, the tribal leaders, have knowledge to the contrary?

Mr. **Hobbs**. That is correct. The tribe is prepared to live quite happily with the status quo, which includes the fact that they have a working, joint agreement with the State commission that regulates the production of oil and gas. That sort of situation ought to continue in the opinion of both the State and the tribes.

Senator **Andrews**. The statements of the Department of the Interior and the Corps of Engineers indicated that the Three Affiliated Tribes may have received compensation for some coal reserves that are part of the lands affected by this bill in the settlement of a claim against the United States in 1981. How many acres of land in the Garrison taking area with coal reserves were involved in this claim settlement, and how much compensation did the tribes receive?

Mr. **Hobbs**. We are investigating that now, sir, and there is a meeting set with the Justice Department lawyer today to try to reach agreement on what those figures are. It is a relatively small matter; I think we are talking something like 20,000 to 24,000 acres of land. The settlement involves something like $6 an acre.

Senator ANDREWS. Can you provide that specific information for the record before the time the record closes?

Mr. HOBBS. We will do so, and it will be an agreed set of figures with the Justice Department attorneys.

Senator ANDREWS. Does the tribe have any plans to attempt to extract coal from these lands?

Ms. SPOTTED BEAR. No, Senator, we have no plans to extract coal from these lands.

Senator ANDREWS. Is it even feasible to develope these coal sources?

Ms. SPOTTED BEAR. I have serious doubts that it is feasible. But we have coal resources in a lot of other areas of the reservation, not only in this particular area. If we were to extract any, it would be in those other areas.

Senator ANDREWS. So anything under the water would be extremely expensive.

Most of the land that is the subject of this bill was acquired from individual tribal members. However, this bill will vest ownership of these mineral resources in the Three Affiliated Tribes and not the individuals from whom the lands were acquired. What was the basis for your decision to seek ownership for the tribes, and does this reflect the wishes of the tribal members?

Ms. SPOTTED BEAR. The reason is that it would be a procedural nightmare to try to go back and ascertain ownership because of all the different individuals who have passed on and all the different hands that the land has gone through.

The tribal membership is aware of this bill and we are all hoping that it will pass.

Senator ANDREWS. It appears that some scattered parcels of land in the area affected by this legislation were not held by tribal members, or at least were not held in trust. How much of this land was owned by people who were not members of the tribe?

Ms. SPOTTED BEAR. Probably anywhere from 5 to 7 percent.

Senator ANDREWS. Has the tribal council been contacted by any of these people with respect to this legislation?

Ms. SPOTTED BEAR. No.

Senator ANDREWS. Would you anticipate any problems if the mineral interests to these parcels were held out of this bill, to be restored to the original owners?

Ms. SPOTTED BEAR. Yes; there would be problems because of the fact that there would be a lot of different owners that would have to be ascertained. It would be the same situation as it is for the tribe if we wanted the minerals to be restored to the individual tribal members.

Mr. HOBBS. May I add a note to that, Senator?

Senator ANDREWS. Surely.

Mr. HOBBS. The only purpose of holding out from the bill those isolated, occasional parcels that used to belong to non-Indians—if it is to continue to be held by the United States, there would not seem to be any purpose that would rise higher than the whole purpose of this bill which is to restore land from the United States to the tribe. If, on the other hand, it were held out of the bill in order to eventually restore it to individuals, then you run into the very same problem as Alyce has described; if the whole lakebed or the minerals in the lakebed were given back to individual tribal members. The ownership problems would be just stupendous.

Furthermore, the individuals do not have and never did have the kind of equity to the return of these minerals that the tribe has. The white people who have them, in effect, were latecomers. They acquired those interests from Indians long after the reservation was opened and the northeast segment made especially for white people—which the tribe, I might add, has reserved out of the bill. The bill does not affect any of the interests in the northeast segment. The remainder of the segment is basically an Indian reservation, and the previous white owners had bought from Indians and knew that they were on a reservation and subject to Indian jurisdiction.

Senator **Andrews**. Have you had, as counsel, any contact by non-Indian owners of this land?

Mr. **Hobbs**. No; this bill has been widely advertised in the area. I have been surprised and interested to know whether there was going to be any response, and there has been none. I think the answer is that the ownership has passed in probably more than half the cases—there are only a few cases, to start with—and more than half of those, I would bet, are in the second or third generation's hands and they probably do not know they ever owned them.

Senator **Andrews**. That is true, counsel. The problem that we have in the committee is that we understand that there has been a question raised; and because the lands amount to only 6 percent or less, I would hate to see this bill, as important as it is to the tribe, to founder on a disagreement between some of the people, the non-Indian owners and the rest, if something can be done to alleviate that. That is the reason for the questions. I do not want us to go out of here thinking that we have the grounds for a bill that has equity and suddenly some group comes up and says:

> Look, if you are going to protect the mineral rights of this group, then how can you avoid protecting the mineral rights of this other smaller group?

I have seen, in the years I have been in Congress, many well-intentioned pieces of legislation founder on the rocks of that type of a reef.

Mr. **Hobbs**. Obviously a good point, Senator. The tribe had felt, though, when they gave up their hopes to get back the minerals in the homestead area, that they were making an enormous concession for the benefit of the white residents of the reservation and that the small number of residual, formerly white-owned parcels would properly come under tribal ownership en masse. These minerals, if they are ever to be developed, the more individual owners you get in there the more difficult it is going to be to pool the oil interest. It is the kind of interest that ought to be dealt with in large blocks, and that is why the tribe agreed—after considerable discussion—to take out the homestead district from the bill.

Senator **Andrews**. Well, let me try another tack.

In the case of the lands that were held by members of the tribe and the tribe itself, I understand that there was some small fee paid for the mineral rights, much below the value of those rights, and that is what the legislation corrects. But were the owners of these parcels of fee land given an opportunity to reserve their mineral interests at the time of the taking?

Mr. HOBBS. We know that some of them were because they did reserve them, and they will not be affected by this bill.

Senator ANDREWS. Then it would appear that if some were given that opportunity, then all of the non-Indian owners had to be given essentially the same opportunity. So they had a different choice, as you remember it back then, than the Indians had?

Mr. HOBBS. That is correct. As you will recall, the Indians were the first ones approached for the transfer of their land; and the whole project could not proceed until they knew they were going to have the reservation taken care of. So they took care of the Indians, and it was immediately after that, the same year, that the Indians were receiving their payments and the Corps of Engineers changed its policy. Up in the homestead area, dozens of people reserved their mineral rights, and some of them in the Indian district reserved their mineral rights. So what happened was, you have the Indians taken care of, then the policy changes——

Senator ANDREWS. Not very well, though.

Mr. HOBBS. No, not very well.

Senator ANDREWS. They were taken care of, but not for the benefit of the Indians, which happens all too often. But to your recollection—of course, we can ascertain this from the Department by going back and checking the records—it puts a totally different aspect on these non-Indian lands if they were given the opportunity to reserve their mineral interests and, of their own volition, decided not to; that puts a totally different light on it.

Mr. HOBBS. Well, those who may have to administer these minerals later on will be grateful for as solid a block of tribal ownership as this committee sees fit to approve.

Senator ANDREWS. I think, Madam Chairwoman, and Mr. Hobbs, and your associates, that we have compiled a pretty good record. Thank you.

Mr. HOBBS. May I make one more suggestion, just as a reminder? In my statement there is a reference at the end to a briefing book which we have previously furnished the committee. We would like to include that book by reference——

Senator ANDREWS. We will include it by reference[1] and it will be in the files of the committee. We appreciate that, Mr. Hobbs.

Mr. HOBBS. Thank you, Senator.

Senator ANDREWS. Thank you for your appearances this morning.

[The prepared statement follows. Testimony resumes on p. 50.]

PREPARED STATEMENT BY CHARLES A. HOBBS ON BEHALF OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION

Mr. Chairman, I am Charles A. Hobbs of the law firm of Hobbs, Straus, Dean & Wilder, Washington, D.C. We are Washington attorneys for the Three Affiliated

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[1] "Briefing Book. The Fort Berthold Reservation Mineral Restoration Act (S. 2480), May 1984," by Charles A. Hobbs and Robert J. Martin of Hobbs, Straus, Dean & Wilder, a law firm of Washington, DC. A memorandum in support of the Fort Berthold Reservation Mineral Restoration Act has been excerpted and printed immediately following the prepared statement of Charles A. Hobbs. The remainder is retained in committee files.

Tribes. We or our predecessor firm have represented the Tribes on their federal land claims since 1951, and on their general federal affairs since 1967.

The tribal Chairman, Alyce Spotted Bear, has testified about the circumstances under which the Tribe was forced to give up its best land in 1949 for the benefit of downstream owners. She has also testified about some of the hardships these Indians have suffered because of it. It is true that they were paid for their land, but as some Congressmen recognized even in 1949, it was not enough for what they gave up. They were paid $3.8 million for the 152,000 acres of good bottom land, or about $25 per acre. And if you also count the $8.8 million they got for relocation and intangible damages, they got about $82/acre all told. This was for loss of their homes, security, communities and even way of life.

The people of this Tribe used to be among the strongest in the country from the standpoint of getting by without welfare payments. That is no longer true, thanks to the Garrison Dam. The Fort Berthold unemployment statistics are among the worst in the country—around 60%. The Tribe desperately needs to build up the economy of the Reservation, which, as the Chairman testified, has never recovered from the Garrison Dam taking. If there is any commercial oil or gas under this lake, the bill will help the Tribe to infuse some money into the Reservation economy and create jobs.

There are other good reasons why this bill should pass:

1. Congress traditionally has reserved minerals to tribes when opening reservations to settlers (the northeast part of Fort Berthold was opened in 1910), and the complications caused by tribal minerals passing into white ownership prior to the 1949 taking would never have occurred if the presence of oil or gas had been known in 1910, or if some of the coal had been properly classified in 1911 by the U.S. Geological Survey.
2. The Corps of Engineers changed their policy on minerals immediately after the Fort Berthold Indians lost theirs, and other condemnees, including some non-Indian owners on the Fort Berthold Reservation, were allowed to keep their minerals. In fact, the four major downstream tribes own the minerals under their reservoirs; only the Fort Berthold Tribe, the first to give up its land for a reservoir, does not.
3. The Tribe was told at the time of the taking that they could seek amendments after the basic Act was approved. One amendment they have sought time after time since then is a bill restoring mineral rights. Over a dozen mineral bills have been introduced since 1950; hopefully this one will pass.

When the Tribe launched its latest effort three years ago, it wanted restoration of all land and minerals under the lakebed everywhere within the Reservation, and also protection of hunting and fishing rights, water rights, and jurisdictional rights. As part of a process of compromise to encourage the support of the State and of the non-Indians on the Reservation, the Tribe has: (1) deleted its request for restoration of the lakebed; (2) deleted the Homestead District; and (3) deleted reference to hunting, fishing and water rights, and to jurisdiction.

A meeting was held at Four Bears in July 1983, at which the reduced proposed bill was explained to representatives of the Homestead District and the State. No significant objection to the proposed bill was voiced at that meeting. A similar presentation was made to the Governor's Commission on Indian Affairs in Bismarck in December 1983, which I am told unanimously supported the proposed bill.

On June 19, 1984, another meeting was held in Bismarck, chaired by a special assistant to the Governor, and including representatives of a number of State agencies, and several representatives from the Homestead District. At this meeting no one voiced any objection to the principles of the bill (although several specific suggestions for amendment were made, and some representatives from the Homestead District felt that certain unrelated jurisdictional problems between them and the Tribe should be solved before they would feel free to support the mineral bill).

In summary, the Tribe has strong grounds for its request for return of minerals. It has made a good faith effort to shape its request in a way that does not offend the legitimate concerns of the State or the people of the Homestead District. The Tribe is willing to accept some further amendments in that direction. With those amendments the Tribe respectfully urges that the bill be passed.

We have earlier submitted to each member of the Committee a "briefing book" containing a colored map, a full explanation of the history of and special reasons for the bill, and pertinent supporting documents. We include the contents of that book herein by reference.

I appreciate the opportunity to appear on behalf of the Tribe in this matter.

MEMORANDUM
IN SUPPORT OF
THE FORT BERTHOLD RESERVATION MINERAL RESTORATION ACT
(S.2480)

I. Purpose of S.2480

The narrow purpose of S.2480 (introduced by Senator Andrews and Senator Burdick on March 27, 1984) is to return to the Three Affiliated Tribes of the Fort Berthold Indian Reservation of North Dakota ("the Tribe"), beneficial ownership of mineral rights on portions of reservation lands acquired over three decades ago by the United States in connection with the Garrison Dam and Reservoir Project. Under the proposed legislation, the Tribe would be able to exploit these mineral rights or obtain income through their development by the United States, when such exploitation would not interfere with federal operation of the Garrison Project.

The bill would also restore certain grazing rights, and permit the Secretaries of the Army and Interior to enter into agreements exchanging land in or near the Garrison Project, with the approval of any owners affected.

Passage of S.2480 as introduced would only restore beneficial ownership of mineral rights under the Garrison Reservoir (known as Lake Sakakawea) and grazing rights along its shoreline, and these would be limited to the Indian District of the Reservation. It would have no bearing on fishing, water or recreational rights in the area. Nor would the legislation disturb the status quo with regard to civil or criminal jurisdiction including the present role of the State of North Dakota in regulating mineral-resource development under Lake Sakakawea. No appropriations would be required by the legislation.

II. Justification for S.2480

Enactment of S.2480 would remedy part of an historic injustice in the unique circumstances under which the lands in question ("the Taking Area") were acquired from the Fort Berthold Indians. Those circumstances involved the uprooting of an entire tribal society; negotiations with tribal representatives who found themselves under extreme duress; and the acquisition of all tribal interests, claims and rights to lands on terms which did not comport with the federal trust responsibility to Indians. Other Indian tribes were also affected by the taking of land along the Missouri River under authorization of the 1944 Flood Control Act, but none was so thoroughly devastated -- socially, culturally and economically -- as the Fort Berthold Reservation; none was dealt with so unconscionably; and none was deprived of its beneficial ownership of all mineral rights underlying the acquired trust lands.

III. History of the Taking

A. Early Reservation History. The Fort Berthold Indians comprise three aboriginal tribes -- the Hidatsas (Gros Ventre), Mandans, and Arikaras. Hundreds of years ago these tribes migrated to North Dakota and settled in the valley of the Missouri River. The valley offered the Indians as fine a natural habitat as could be imagined in that area; it provided protection from the winds and the deep winter cold; it was fertile and well-watered, and the hillsides provided many open seams of coal for fuel. Wood and game were abundant. Although they had come as separate tribes, the three groups of Indians merged and established a harmonious life together based on an agricultural economy.

In 1851 the United States recognized as a reservation the 12.5 million-acre territory occupied by the three tribes. See Treaty of Fort Laramie, 11 Stat. 748, II Kapp. 594. By the terms of the Treaty, the United States government promised to protect the Tribes "against the commission of all depredations by the people of the said United States." But by 1910, following three unilateral Executive Order takings and one cession agreement, the Reservation had been reduced in size to 1,000,000 acres. A third of this -- the area known today as the "Homestead District" -- was sold to non-Indians between 1910 and 1920 (with the Indians receiving the proceeds), leaving only 650,000 acres in the Indian-owned part of the Reservation (which is called herein the "Indian District"). See map, frontispiece.

In 1934, pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, the three tribes organized and became officially a tribe known as the Three Affiliated Tribes of the Fort Berthold Reservation.

B. The 1950 Taking

(1) Tribal Opposition to Early Proposals. The preliminary activity that would lead to the Garrison Dam and Reservoir Project, and the taking of land from the Fort Berthold Indians, began in the early 1940s. At that time, heavy flooding along the Missouri River (which flowed through the Fort Berthold Reservation) prompted Congress to direct the Army Corps of Engineers to develop proposals to alleviate the flooding. The Corps, through the so-called Pick Plan, proposed building several "main-stem" dams on the Missouri River which were intended to create giant lakes, each of which would be located such that the impounded waters would inundate substantial areas of several Indian reservations, including the Fort Berthold Reservation. At the same time, the Bureau of Reclamation proposed the so-called Sloane Plan, which emphasized irrigation and the construction of tributary rather than main-stem dams. The Sloane Plan did not include a dam affecting the Fort Berthold Reservation.

Recognizing the potential devastation threatening their Reservation because of the Pick Plan, the Tribal Business Council adopted a resolution opposing the Garrison Dam, and actively lobbied Congress against the project. The Council's resolution prophetically outlined the severe effects construction of the

Garrison Dam would have on the people and the Reservation: flooding of the rich bottom lands which were essential for the Tribe's economy and culture; destruction of the homes and lands of 350 families; and destruction of existing well-organized Reservation Indian communities. Congress virtually ignored the Tribe's con-concerns and passed the Flood Control Act of 1944, 58 Stat. 887, authorizing, among other things, the construction of the Garrison Dam.

After the passage of the Flood Control Act the Tribe intensified its opposition to the plan, going so far as to authorize an engineering study and suggest an alternate location for the dam on the north end of the Reservation, and then offer to give that alternate land to the United States free of charge. In 1948 the government rejected that proposal. Instead, the government offered the Tribe 150,000 non-contiguous acres of land outside the Reservation to replace the 154,000 acres in the proposed Taking Area. The Commissioner of Indian Affairs recommended rejection of the offer of lieu lands because they were inadequate, and the Secretary of the Interior formally rejected the offer on December 27, 1948.

(2) The Contract with the Corps of Engineers. After all prior attempts to reach a settlement with the Tribe failed, Congress authorized the Corps of Engineers to negotiate

an agreement (contract) with the Tribe to provide for cash compensation and other benefits for the land to be taken from them for the Garrison Dam project. Congress appropriated $5,105,625 for that purpose. 1/

Because construction of the Garrison Dam had already begun, 2/ the Tribe had no choice but to "negotiate" with the Corps and attempt to save what it could. The final contract, 3/ while far from satisfactory, did protect some of the Tribe's interests. The Tribe, believing that at this point it would receive no better offer, agreed to the contract on May 20, 1948. 4/

The contract granted the Tribe monetary compensation $5,105,625 (and additional sums as required), and other benefits. It provided, in Article X, that the Tribe would be entitled to free use of the Taking Area between the taking line and the water line for grazing, and that hunting and trapping rights would be reserved to them as well. Article XI further granted the Tribe the right to remove timber and forest products, sand and gravel,

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1/ Civil Appropriations Act for Fiscal Year 1948, 61 Stat. 686, 690 (1947).

2/ By 1946, $6,000,000 had been spent on preliminary work for the Dam, including construction of an access road to the Dam site.

3/ A copy of the contract is attached hereto as Exhibit B.

4/ One of the saddest photographs in Indian history captured then-Fort Berthold Chairman George Gillette covering his face as he wept during the signing "ceremony" in Interior Secretary J.A. Krug's office. At the time Chairman Gillette said: "The members of the Tribal Council sign this contract with heavy hearts. Right now the future does not look good to us."

and coal from the Taking Area. And under Article XII, the Tribe was entitled to receive royalties for all oil and natural gas extracted from the Taking Area.

The first bill introduced in Congress to provide for the taking of land in the Fort Berthold Reservation, incorporated the terms of this contract. Despite Department of Interior support for passage of this bill (bolstered by a memorandum to Congress spelling out the disastrous effect the Project would have on the Fort Berthold Indians and their Reservation), Congress deleted all favorable non-monetary terms in the contract when it finally acted. Instead, in the final bill, Congress increased the payment to $12,605,625 ($82 per acre) to pay for the taking and relocation expenses as well, making no mention whatsoever of the benefits negotiated in the now-discarded contract.

Many members of Congress active in the debate were by no means satisfied with the eventual result:

> "Some House members expressed dissatisfaction with the bill in its final form, as well they might, but a sense of urgency and, perhaps, of the futility of further wrangling led them to accept it. Representative Lemke, father of the original bill, said, 'I do not consider it a just or moral settlement. We are again violating a treaty solemnly entered into with these tribes -- a treaty in which we promised them never to disturb them again.' And he added, 'Unfortunately, the Indians have no choice. It is not a voluntary settlement.' Representative D'Ewart, not ordinarily considered a friend of the Indian, was disturbed by the manner in which it had been arrived at: 'The wrong in this method,' he said, 'is that negotiations with the Indians were not started

> until after construction was actually begun on this project.'" 5/

(3) The Taking Statute and Tribal Acceptance of It. On October 29, 1949, the Act which took some 154,000 acres of land from the Fort Berthold Indians became law. 63 Stat. 1026. 6/ All the non-monetary benefits originally negotiated between the Tribe and the Corps were omitted. Payment of the money was conditioned on the Indians agreeing to the sum as "final satisfaction" of all their rights in the land -- in other words, surrender of their right to go to court to challenge the Act at any future time. Faced with the combination of immediate cash offered, and a sense of total futility (the Dam had already been closed and the water was rising), the members of the Tribe approved the 1949 Act in a referendum held in 1950.

C. The Effects of the Taking

After the Act was approved, the Garrison Dam and Reservoir Project was completed (the reservoir had started to fill even before the Act was approved). It had a devastating physical effect on the Reservation that destroyed the social and cultural fabric and the economic way of life of the Indians. Lake Sakakawea, the lake created by the Garrison Dam, divided the Reservation into five separate segments. 7/ As a result, Indian families who had lived together in close-knit communities and

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5/ 35 North Dakota History: Journal of the Northern Plains, "The Garrison Dam" p. 293 (1968) (Exhibit J).

6/ A copy of the Act is attached hereto as Exhibit C.

7/ Please note the map, frontispiece.

subcultures on the Reservation were forced to scatter. The huge lake continues to make even the simplest communication among former neighbors impossible. (Over the years, only one bridge has been rebuilt across the 75-mile length of the lake, within the Reservation, making it necessary for Indians to drive long distances to visit relatives and friends.)

The completion of the Garrison Dam had an equally devastating effect on the Tribe's economy. The Dam flooded the rich bottomlands on which the Indians had lived and built their economy, resulting in deprivation of at least half of the Indians' agricultural potential. The Indians were forced to rebuild their lives on the dry, treeless, unprotected prairie lands. Roads, hospitals, schools and other important facilities were destroyed in the flooding. The disruptive physical changes on the Reservation continue to make it extremely difficult for the Tribe to function as an economically self-sustaining entity.

D. Legislative Efforts Since the Taking Act

Beginning almost immediately after passage of the 1949 Act, the Tribe has made repeated legislative efforts to amend the statute, or pass new statutes restoring to it some of its former rights. A number of bills were introduced over the years in attempts to restore grazing and hunting and fishing rights to the Indians. In the 81st, 82nd, 84th and 85th Congresses [8/] the Tribe attempted to secure legislation to that effect, but it was

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[8/] 81st Cong., S.3303; 82nd Cong., S.1830; 84th Cong. S.1956, H.R.9324; and 85th Cong., S.1131.

not until September 25, 1961, that Congress passed an amendment to the Act granting to the Tribe grazing rights on land formerly owned by Indians. [9] This is the only amendment to date affecting the Tribe.

Similarly, the Tribe has made numerous attempts to obtain legislation that would return to them the mineral rights in the land they lost. Senator Young introduced legislation in both the 81st (S.3303) and 82nd (S.1830) Congresses that would have amended the 1949 Act to provide that all mineral rights be reserved to the Tribe. Neither effort met with success. Other bills were introduced in each Congress, from the 83rd through the 87th Congress, to return mineral interests to the Tribe. [10] None was enacted into law.

IV. Uniqueness of the Fort Berthold Situation

Other Missouri River tribes whose land was condemned for Corps of Engineers projects were treated by the United States much differently -- and much more fairly.

Between 1954 and 1962 the United States took land from five other Missouri River tribes for Corps of Engineers projects authorized by the Flood Control Act of 1944. (The locations of these projects and the reservations involved, are shown in the map on Page 20.) Those acquisitions involved:

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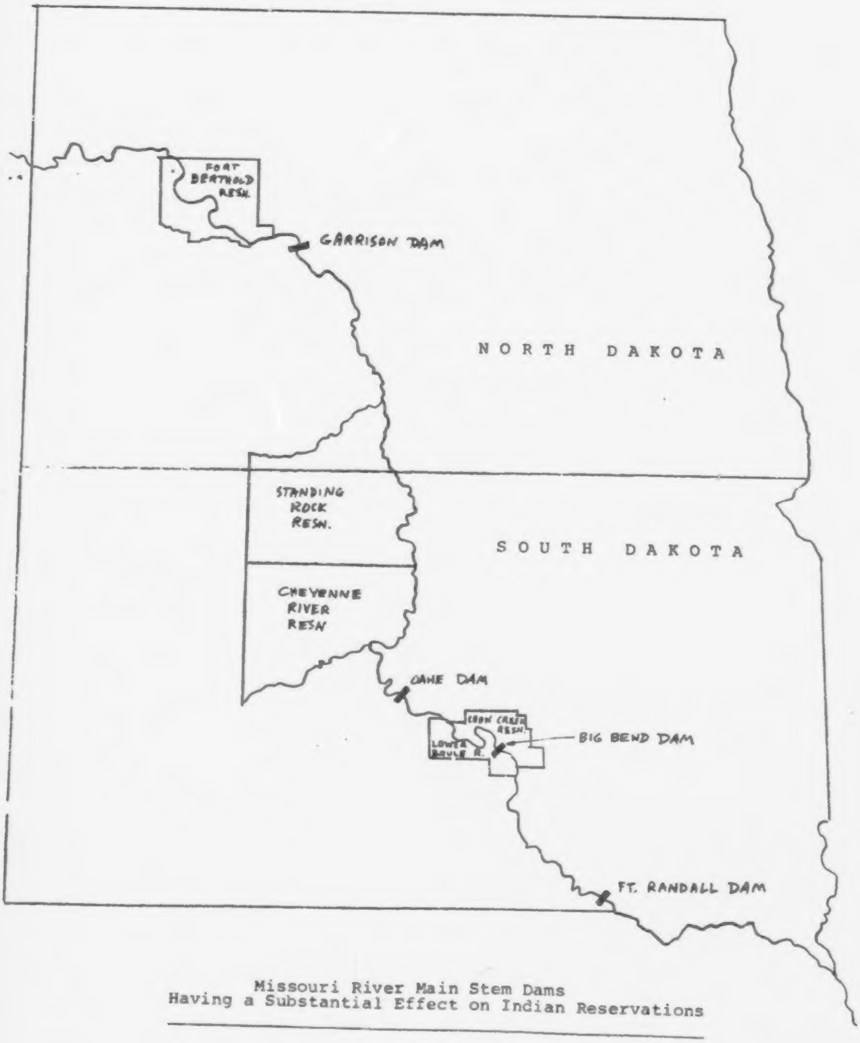
[9] 76 Stat. 594. A copy of the Act is attached hereto as Exhibit D.

[10] 83rd Cong., S.74, S.2812, H.R.7282; 84th Cong., S.746, H.R.4292, H.R.5214; 85th Cong., S.1130; 86th Cong., S.557; 87th Cong., S.39, S.41.



Missouri River Main Stem Dams
Having a Substantial Effect on Indian Reservations

(1) **Lower Brule Sioux**, for both the Big Bend Dam and Reservoir Project, 76 Stat. 698 (1962) and the Fort Randall Dam and Reservoir Project, 72 Stat. 1773 (1958);

(2) **Crow Creek Sioux**, for both the Big Bend, 76 Stat. 704 (1962) and Fort Randall, 72 Stat. 1766 (1958), Dam and Reservoir Projects.

(3) **Standing Rock Sioux**, for the Oahe Dam and Reservoir Project, 72 Stat. 1762 (1958);

(4) **Cheyenne River Sioux**, for the Oahe Dam and Reservoir Project, 68 Stat. 1191 (1954); and

(5) **Yankton Sioux**, for the Fort Randall Dam and Reservoir Project. [11]

For each of these tribes, Congress enacted legislation that preserved their rights and protected their economic status far more completely than the 1949 Act protected the Three Affiliated Tribes:

A. Loss of Mineral Rights.

The sheer size of the taking in the case of the Three Affiliated Tribes (154,000 acres) extends well beyond any other taking from the other Missouri River tribes. In fact, Congress expressly reserved or restored mineral rights to the other downstream tribes whose reservation land was taken for Corps of

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[11] A total of about 2,400 acres was taken from members of the Yankton Sioux Tribe, each of whom was compensated through a condemnation action brought by the United States. In addition, Congress, in 68 Stat. 452, appropriated $106,500 for relocation and rehabilitation. Because 2,400 acres represents relatively insignificant acreage in comparison to that taken from the other five tribes, no further analysis of the Yankton Sioux taking will be made here.

Engineers projects (except Yankton, see previous note). For the Oahe Dam Project, Congress reserved in the Standing Rock Sioux and Cheyenne River Sioux all minerals, including oil and gas, within the taken areas. 12/ For the Big Bend Dam Project, Congress took from the Crow Creek Sioux and the Lower Brule Sioux "the entire interest, including gravel but excluding the interest in oil, gas and all other minerals of any nature whatsoever. . . ." 13/ Earlier statutes revested in the Crow Creek Sioux and the Lower Brule Sioux all right, title and interest in minerals that had been acquired by the United States in condemnation proceedings for the taking of their lands in connection with the Fort Randall Dam. 14/

This reservation and/or restoration of mineral rights in the downstream Missouri River tribes reflected a change in Corps of Engineers land-acquisition policy adopted in 1951. Coinciding roughly with the discovery of oil and gas reserves in the vicinity of the Garrison Dam Project, the Corps determined that those whose lands were being acquired could in fact reserve their mineral rights thereto (which amounted to giving the Corps only a flowage easement), when doing so would not be incompatible with the purpose of the project. This policy shift, however, occurred just after it could be of any benefit to the Three Affiliated Tribes.

12/ 72 Stat. 1762, Sec. 6; 68 Stat. 1191, Sec. VI.

13/ 76 Stat. 704, Sec. 1(a); 76 Stat. 698, Sec. 1(a).

14/ 72 Stat. 1766, Sec. 3; 72 Stat. 1773, Sec. 3.

B. Grazing Rights.

In addition to mineral rights, the four major downstream tribes retained grazing rights in the freeboard (the dry land between the water line and the taking line), and access to the shoreline of the reservoir. [15] As explained above, the contract negotiated between the Tribe and the Corps of Engineers had expressly reserved these rights -- but those provisions were disregarded in Congress' final revision of the Act. In 1962, Congress enacted Public Law 87-695, 76 Stat. 594, granting grazing rights to the Tribe on such part of the freeboard as was formerly owned by Indians, which included most but not all of the freeboard in the Indian District. In the cases of the other tribes named, the tribes retained grazing rights in all of the freeboard (see Exhibit K).

V. Status of Mineral Development on the Fort Berthold Reservation

Deposits of coal underlie Lake Sakakawea in its entirety, but this is low-grade coal (lignite) which would sell for less than the cost of extraction. It is unlikely that any coal under the lake will be mined in the foreseeable future.

The Fort Berthold Reservation has been the site of considerable exploration, and some development, of oil and gas, over the past few years. Virtually all of the Reservation part of Lake Sakakawea is under lease, and in the Lake and along its shorelines within the Reservation, private companies recently have conducted about 500 miles of seismic exploration. The accumulated data appear to reveal the presence of some oil and gas, but there has not yet been any drilling in the Reservation part of the Lake. 16/

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[15] 72 Stat. 1766 (Crow Creek-Fort Randall Dam); 76 Stat. 704 (Crow Creek-Big Bend Dam); 72 Stat. 1773 (Lower Brule-Fort Randall Dam); 76 Stat. 698 (Lower Brule-Big Bend Dam); 72 Stat. 1762 (Standing Rock Sioux); 68 Stat. 1191 (Cheyenne River Sioux).

On the remainder of the Reservation, outside the Taking Area, there has been about 6,000 miles of seismic exploration, and about 24 exploratory wells have been drilled within the past four years. Out of these 24, seven have been brought into production, but three have since been abandoned. Of the exploratory wells, one well is on tribal land, one on fee land, and the remainder are on allotted trust land.

VI. The Tribe Lost the Minerals by Historical Accident

The Tribe historically owned all of the oil and gas under its reservation, and indeed, would own it all today if Congress had known in 1891 when the present boundaries of the reservation were set -- 26 Stat. 989 -- that there was promise of oil and gas within the reservation. It was Congress's regular policy to reserve minerals to a tribe whenever allotting or opening reservations to white settlement, whenever the presence of valuable minerals was known or suspected. And in fact, Congress

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16/ The Corps of Engineers has granted a permit for one exploratory well in the Taking Area, but the well has not been drilled because the Tribe has thus far declined to grant an easement or sign a unitization agreement.

specifically followed this policy when it opened the northeast part of the reservation to white homesteading in 1910:

> "[I]f there be found any lands bearing coal or other mineral, the Secretary of the Interior is hereby authorized to reserve them for allotment or other disposition until Congress shall provide for their disposal. . . ." 36 Stat. 455 (emphasis added).

The U.S. Geological Survey did classify some of the reservation as coal land, and this coal was reserved to the Tribe. But a substantial part of the land was negligently not classified as coal bearing, though under then-current USGS manuals it should have been (and in 1917 in fact was so reclassified, but too late to save the coal that had passed to the allottees and homesteaders in the meantime). These facts appear as part of the attorneys' and expert witness files in Indian Claims Commission Docket 350-G, settled by agreement in 1982, without court findings.

When the reservoir land was taken in 1949, the Tribe and its members were paid $68,000 for the mineral rights under the entire 154,000 acres taken. Exhibit E, p. 22. The Tribe has offered to repay this.

VII. Conclusion

The enactment, forty years ago, of a well-intentioned federal policy to lessen the impact of repeated flooding along the Missouri River valley, has resulted in the members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation suffering a highly disproportionate share of the burden, far more than their non-Indian neighbors, and even more than the other

Indian tribes downstream. An important aspect of this historic injustice can be corrected today -- with no outlay of appropriated funds -- by passage of S.2480, which would restore to the Tribe mineral rights in the Indian District of the Reservation, and also a few remaining grazing rights in the Indian District that the Tribe does not already own.

Enactment of S.2480 would in no way interfere with the operation of the Garrison Dam and Reservoir Project; to the contrary, its operation would be facilitated by S.2480's authorization of land-transfer agreements which would permit the Corps to acquire additional land from the Tribe around the shoreline. It would not affect the Homestead District of the Reservation. It would not alter the status quo with respect to hunting and fishing in the Lake, or to State of North Dakota jurisdiction over the lands in question. It would, however, constitute an act of justice and good faith, and possibly a much-needed economic benefit, to the Three Affiliated Tribes, and an affirmation of the present-day vitality of the trust relationship between the Indian people and the federal government.

Senator **Andrews**. Our next witness is Mr. William Cronin, Chief of the Legislative Services Office, Directorate of Real Estate, Office of Chief of Engineers, Department of the Army.

Mr. Cronin, I understand that you have a statement for the record?

Mr. **Cronin**. I do, Mr. Chairman.

Senator **Andrews**. Do you wish to include that in the record? We will have it appear as if every word of it was spoken.

Mr. **Cronin**. Yes, I do.

Senator **Andrews**. Now let me ask you a question. Under the provisions of this bill any exploration, development, production, or extraction of minerals must be conducted in accordance with regulations prescribed by the Secretary of the Army in order to protect the Garrison Dam and Reservoir and carry out the purpose of the project. What do the current regulations provide, and what is the policy of the corps, with respect to adhering to State law in mineral development?

TESTIMONY OF WILLIAM J. CRONIN, CHIEF, LEGISLATIVE SERVICES OFFICE, DIRECTORATE OF REAL ESTATE, OFFICE OF CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY

Mr. **Cronin**. I am not aware of any uniform, across-the-board regulations that would govern the removal of minerals from within the project area.

Normally, because of the differences in projects, the differences in contours, and the like, the situations must be addressed on an ad hoc basis to determine whether there would be any interference with the operation and maintenance of the project and what would need to be done to prevent such interference.

Senator **Andrews**. In your opinion, would it be in any way possible or feasible to develop the coal in this area without being in conflict with the purpose of the Garrison Project?

Mr. **Cronin**. Mr. Chairman, I think I would need to furnish that information for the record. We would have to get our technical people involved in this to determine if so and how.

Senator **Andrews**. Thank you very much. That helps very much.

[The statement follows:]

PREPARED STATEMENT OF WILLIAM J. CRONIN, CHIEF, LEGISLATIVE SERVICES OFFICE, DIRECTORATE OF REAL ESTATE, OFFICE OF CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY

Good morning, Mr. Chairman and members of the Committee. I am William J. Cronin, Chief of the Legislative Services Office, Directorate of Real Estate, Office of the Chief of Engineers, Department of the Army. I have been designated to represent the Department of the Army at this hearing on S. 2480, 98th Congress, a bill "To declare that the mineral rights in certain lands acquired by the United States in connection with the Garrison Dam and Reservoir Project are held in trust for the Three Affiliated Tribes of the Fort Berthold Reservation, and for other purposes."

PURPOSES OF THE BILL

The purposes of the bill are: to reconvey the minerals to the Tribe; to extend to the Indians grazing rights over isolated tracts within the Reservation boundaries, but not acquired from the Indians; and to create land exchange and land transfer authority by agreement between the Secretary of the Army and the Secretary of the Interior.

ARMY POSITION

The Department of the Army must defer taking a position on this bill until a number of unanswered questions have been addressed. We will report back to the Committee with a definitive position on this bill by the end of July.

There has been litigation in the Court of Claims, against the United States brought on behalf of those who would benefit from this legislation. This litigation involved rights related to the Garrison Dam and Reservoir project. This litigation was settled on May 29, 1981, with the plaintiffs receiving $10.25 million. The plaintiffs, in the stipulation of dismissal, agreed to release all rights and demands which were raised or could have been raised in the litigation. The Department of Justice will undertake to review how this litigation and its settlement impacts upon this legislation, in addition to any other concerns which may be present.

BACKGROUND

The Department of the Army acquired approximately 460,000 acres along the main stem of the Missouri River in North Dakota for the Garrison Dam and Reservoir Project, as authorized by the Act of December 22, 1944 (58 Stat. 887, 891). Of this, approximately 150,000 acres were acquired from the Three Affiliated Tribes of the Fort Berthold Reservation under the authority of the Act of October 29, 1949, 63 Stat. 1026. Under this Act, the Tribe was paid $12,605,625 for "all right, title, and interests of the Tribe, allottees, and heirs of the allottees" in the lands taken, and in full satisfaction of "all claims, rights, demands, and judgments arising out of the Act or existing on the date of enactment." The Tribe accepted the Act by referendum.

Prior to 1951, it was the Army's policy to acquire fee simple title to all lands required for project purposes, including all mineral rights. By late 1951, fee title to approximately 170,000 acres had been acquired from private landowners for the project. In addition, fee title to the approximately 150,000 acres of the Three Affiliated Tribes of the Fort Berthold Reservation had been acquired.

In 1951, the Army determined that, where it would not be incompatible with project requirements, landowners should have the right to retain oil and gas rights in their lands. Some landowners did reserve oil and gas rights while others conveyed full fee interest to the United States.

In 1953, the Department of the Army and the Department of the Interior announced a Joint Acquisition Policy, which would restrict land acquisition for reservoir projects to the minimum estate necessary for the construction, operation, and maintenance of the project. Under this policy, the full fee estate was taken only where essential, e.g. at the dam site and within close proximity to structures. In other instances, the fee was acquired but owners were allowed to retain mineral interests and other rights, where not incompatible with project purposes. Easements were acquired where lands were only occasionally inundated. This policy was used to acquire the remaining lands needed for the Garrison Project.

The policy changes in 1951 and 1953 that some landowners could retain oil and gas rights meant that mineral rights were acquired for project lands during the early stages but not acquired in the upper project areas. However, there is no legislative authority under which the Secretary of the Army could reconvey mineral interests to former owners where acquisition had been completed. This includes all of the lands acquired from the Three Affiliated Tribes.

That concludes my prepared statement, Mr. Chaiman. If you have any questions, I will be happy to answer them.

Senator **Andrews**. I see my colleague, the senior Senator from North Dakota, Senator Burdick has returned. Senator, I understand you have a statement? You are the cosponsor of the bill and we are glad to have you here.

STATEMENT OF HON. QUENTIN N. BURDICK, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator **Burdick**. Mr. Chairman, I am pleased to be here today to testify in support of S. 2480.

The primary purpose of the bill is to return to the Mandan, Hidatsa and Arikara Tribes beneficial ownership of mineral rights on reservation lands acquired three decades ago by the United States in connection with the Garrison Dam.

The Missouri Flood Control Project destroyed and uprooted the economy and social organization of the Fort Berthold Indians. The 1949 act flooded 154,000 acres of prime river bottom land. The homes and lands of 349 families was flooded under water to a depth of 100 feet or more. The flooding of this valley disrupted the agricultural and livestock enterprises of the Indians which had come to provide 70 percent of their earned net income.

Three out of four Fort Berthold households were scattered into five water-separated segments of upland prairie. Physical separation between families and disruption of the Indian cattle economy broke up the high degree of community life and destroyed the fundamental basis of their culture.

S. 2480 would correct part of an historic injustice to the tribes. The tribes strongly opposed building Garrison Dam, but ultimately Congress authorized its construction, conditioned on the Corps of Engineers obtaining agreement by the tribes as to the terms of compensation for their land. The tribe agreed to compensation including certain major rights—grazing rights, hunting and fishing rights, recreation concession rights and subsurface mineral rights within the Taking Area.

The Fort Berthold Indians were forced to accept the compensation terms dictated by Congress in 1949. The act expressly deleted terms in a contract negotiated between the Army Corps of Engineers and Indians. The Indians were given the alternative of accepting the terms within 6 months or seek a judicial remedy. The tribes accepted the $12.6-million cash offer because it felt it could no longer fight the Federal Government. The dam had already been closed and their homelands were being flooded.

Beginning almost immediately after passage of the 1949 act, the tribes made repeated legislative efforts to amend the statute or pass new statutes restoring to it some of its former rights. Legislation restoring mineral rights was introduced in the 81 through 87 Congresses.

None of these bills were enacted into law despite a change in the Army Corps of Engineers land acquisition policy in 1951. The Corps determined that it no longer would require landowners to give up mineral rights. This policy shift, coincided with the discovery of oil and gas reserves in the vicinity of the Garrison Dam, occured just after it could be of any benefit to the Three Affiliated Tribes. In addition, Congress made sure that the five downstream Missouri River tribes retained their mineral rights in subsequent water projects.

The bill restores the mineral rights in the Taken Area and will not affect the ability of Federal authorities to operate the Garrison Dam and Reservoir without interference. No appropriation would be required by the legislation. The bill would also restore certain grazing rights, and would permit land exchanges around the edge of the project, as needed.

The Indian community has offered this bill as a compromise in order to gain approval by members of the non-Indian community. The bill does not address the question of water rights, fishing rights, or access to the lake. The bill affects only the Indian district of the reservation. The Homestead District, an area comprising approximately the northeast third of the reservation, and occupied almost exclusively by non-Indians, is not affected by the bill.

The bill would not disturb the status quo with respect to any civil or criminal jurisdictional claims, including the present role of the State of North Dakota in regulating mineral resource development under this lake.

I would like to commend this committee, and refer to the able, commendable leadership performed by my colleague, Senator Andrews, who is chairman of the Senate Select Committee on Indian Affairs, for his personal interest in the North Dakota Indian people. It is my understanding that the tribe has met with public officials and representatives of the non-Indian community in Bismarck several days ago. Public officials have been informed and have raised no objections to the bill on behalf of the State of North Dakota. The Boundary Committee does not appear to have substantive problems with the bill. It does, however, continue to raise its concern with jurisdictional problems. I recognize those concerns. It is to be hoped that negotiations between the Indians and non-Indian communities can resolve many of these pressing issues.

In the meantime, I would urge interested parties not to lose sight of the goals of this legislation. S. 2480 should be viewed as a beginning of a long-needed dialog between both communities.

I might say in closing, Mr. Chairman, that this merely puts this particular area along the Missouri River on a par with other areas along the Missouri River to the south. It is simple justice.

Senator ANDREWS. Thank you, Senator, for an excellent statement. We appreciate your coming here, everyone in North Dakota and across this nation knows of not only your great support for equity for the American Indian, but also your father's wonderful record in this field before. We are glad to have you here and we would be glad to have you stay through the interrogation of the next couple of witnesses if you would like, Senator.

Senator BURDICK. My father came to North Dakota as a 2-year-old child. His family settled on the reservation near Devil's Lake, and I think he was grown to manhood before he realized he was not an Indian. That is how close he was to the Indian people.

Senator ANDREWS. That is right; and the Indian people in North Dakota recognize this, Senator, as you know so well.

Our next witness is Mr. Sidney Mills, the Director of the Office of Trust Responsibilities, Bureau of Indian Affairs in the Department of the Interior, accompanied by Mr. Frank Keel, who is a legislative specialist.

As I understand it you have a statement that you would like to place in the hearing record?

Mr. MILLS. Yes, Mr. Chairman.

Senator ANDREWS. Good. We will insert it in the record following your oral testimony.

There are a number of questions that need to be answered, but the only problem that you refer to is the question of the 1981 claims settlement. With the exception of that one issue, has the Department raised any objection to this legislation?

Mr. MILLS. No, Mr. Chairman. With the exception of that one issue, the Department would be in support of the bill.

Senator **Andrews**. Fine. Thank you very much.

Mr. **Mills**. Thank you, Senator.

[The prepared statement follows:]

Prepared Statement of Sidney L. Mills, Director, Office of Trust Responsibilities, Bureau of Indian Affairs, Department of the Interior

Mr. Chairman and members of the committee, I am pleased to appear before you today to present the views of the Department of the Interior on S. 2480, a bill "To declare that mineral rights in certain lands acquired by the United States in connection with the Garrison Dam and Reservoir Project are held in trust for the Three Affiliated Tribes of the Fort Berthold Reservation, and for other purposes."

We recommend that action be deferred on S. 2480 because a number of unanswered questions must be addressed. The Administration will report back to the Committee with a definitive position on the bill upon its return from the Senate July recess.

Briefly, S. 2480 would return to the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, beneficial ownership of mineral rights on reservation lands acquired for the Garrison Dam and Reservoir Project. It would also restore certain grazing rights in the taken area, and would permit exchanges of tribal and project lands around the project. It would also require any exploration or development of minerals to be governed by Corps of Engineers regulations in order to protect the project.

There has been litigation in the Court of Claims against the United States brought on behalf of those who would benefit from this legislation. This litigation involved rights related to the Garrison Dam and Reservoir Project. This litigation was settled on May 29, 1981, with the plaintiffs receiving $10.25 million. The plaintiffs, in the stipulation of dismissal, agreed to release all rights and demands which were raised or could have been raised in the litigation. We will undertake to review how this litigation and its settlement impacts upon this legislation, in addition to any other concerns which may be present.

The representative of Department of the Army will present the historical background on the acquisition of Indian lands for the Garrison Project.

This concludes my prepared statement Mr. Chairman. I would be pleased to answer any questions you or Members of the Committee may have.

Senator **Andrews**. The next bill that we will hear testimony on is S. 2663 affecting the Sisseton-Wahpeton Tribe. Mr. Bertram Hirsch, the attorney for the Sisseton-Wahpeton Tribe, is here. Mr. Hirsch, we understand that the tribal group that was here had to return to the reservation because there was a sudden death, so you are carrying a double load on your shoulders. I might say, counsellor, they have the utmost confidence in you, but I think the record ought to indicate that the tribal leaders were here and, but for a sudden death, they would have been here to testify. Their remarks you have, as I understand, and they will be inserted in the record immediately following your remarks.

Do you have prepared remarks, Mr. Hirsch?

Mr. **Hirsch**. I have prepared remarks which have already been submitted to the committee.

Senator **Andrews**. They will appear in the record as though you gave them in their entirety.

Let me ask you a question, Counselor. The Department of the Interior is opposing this bill on the grounds that the Indian Land Consolidation Act provides authority for the tribe to enact such an inheritance code. Could you briefly describe how your bill differs from the authority contained in the Indian Land Consolidation Act?

TESTIMONY OF BERTRAM E. HIRSCH, GENERAL COUNSEL TO THE SISSETON-WAHPETON SIOUX TRIBE

Mr. HIRSCH. Yes, I can. As a preface to this, I would like to inform the chairman that I have provided the committee staff with a report or a statement entitled, "Heirship: The Indian Amoeba," which I would like to have inserted in the record as part of my testimony. This is a report that was prepared in 1982 by Michael L. Lawson.

Senator ANDREWS. It is an excellent paper, and we will insert it in the record following your prepared statement.

Mr. HIRSCH. My point, Mr. Chairman, is that it is a report prepared by the Bureau of Indian Affairs in the Aberdeen Area Office, and it focuses on the fractionated heirship problem——

Senator ANDREWS. Every now and then the Bureau does something right.

Mr. HIRSCH. Very true. I will subscribe to the every-now-and-then part of it.

The Aberdeen Area Office prepared this report and has focused on the fractionated heirship problem from a national perspective, but takes the Lake Traverse Indian Reservation as its key jumping-off point. I think that the need for the legislation that you now have before you is graphically illustrated by this report and the factual statements contained therein. The deficiencies of the Indian Land Consolidation Act are also clearly highlighted by some of the factual statements in this report.

I am not going to read you this report, obviously; it is 20 pages long, but I would like to point out for the record a couple of the salient facts that are reported from the Bureau of Indian Affairs records, and then I will specifically and briefly explain how the Indian Land Consolidation Act does not do the job for the Sisseton-Wahpeton Sioux Tribe.

The tribe was the first tribe to ever have its reservation allotted. The allotment process for the Lake Traverse Reservation began in 1887, immediately following enactment of the General Allotment Act. The tribe had approximately 300,000 acres allotted; today, there are only some 110,000 acres in tribal and tribal member ownership.

According to Mr. Lawson's report, he says that in 1887 the tribe collectively cultivated 7,740 acres and harvested 9,000 bushels of corn, and herded 450 head of cattle. He goes on to point out how today, nearly 100 years later, the tribe is making far, far less use of its available acreage than what it was making after allotment in 1887 and he points out that the reason is the fact that fractionated heirships have rendered the land useless. He also points out that some of the heirship interests at Sisseton are now calculated into the trillionths of an interest, and that the Bureau of Indian Affairs has extraordinary costs—this is a 1982 report, where he indicates that the costs of administering the heirship lands at Sisseton run the Government approximately $50 per heir per year—I am sorry, he says $40—the Sisseton agency superintendent informed us last week that it is now approximately $50 per heir per year, far, far more money than what the land itself is actually worth.

As far as the Indian Land Consolidation Act is concerned, and the statement which I have in front of me that Mr. Mills submitted in writing to the committee, the Indian Land Consolidation Act is, in some of its features, similar to S. 2663; but the Indian Land Consolidation Act does not do anything near what S. 2663 would do. I believe S. 2663 would actually eliminate fractional heirship interests at Sisseton over a generation of time, perhaps, whereas the Indian Land Consolidation Act standing alone barely addresses the problem

More specifically, the Bureau of Indian Affairs focuses on section 2205, which permits an Indian tribe to provide by ordinance that nonmembers of the tribe shall not be entitled to inherit land. Our bill contains a similar feature—or, I should say an identical feature. However, under section 2205 of the Indian Land Consolidation Act, in order for a tribe to adopt such a feature in its laws it has to comply with three separate provisos that are included in the act. None of those provisos, which are serious limitations and restrictions and conditions on a tribal enactment, appear in our proposed legislation.

By the way, I should add that, contrary to the notion of the Bureau of Indian Affairs, our bill—or I should say, more acurately, Senator Abdnor's and Senator Pressler's bill—does not seek land consolidation. The Sisseton-Wahpeton Sioux Tribe has a land consolidation statute that was passed by the Congress in 1974. Under that statute the tribe has been able to recover some 20,000 acres of land in the last 10 years.

The Bureau of Indian Affairs, in its own testimony, points out numerous differences between our bill and the Indian Land Consolidation Act. They characterize those differences as "slight variances" and "minor differences." They are not.

For example, in the partition provisions in our bill, which do not appear in current law, we provide that if the holders of a 50-percent interest in allotment seek partition, the Secretary must partition the land. Under current law—or I should say, at least, under current practice—the Bureau of Indian Affairs requires 100 percent approval of all the heirs before partition will occur. This has resulted in no partitioning taking place at Sisseton for many years, even though many tribal members have tried to accomplish that on many occasions.

Many of the other provisions of our bill, which the Bureau of Indian Affairs objects to, are technical in nature and have been resolved by amendments which are attached to the testimony I have submitted to the committee. These amendments were prepared mostly on this past Monday at a meeting attended by committee staff and Department of the Interior staff, myself, and the tribal chairman.

Senator Andrews. Counselor, in your contact with the tribal chairman and the tribal officials, are you aware that the members of the tribe have been apprised of this legislation?

Mr. Hirsch. Mr. Chairman, this bill—I've been involved in representing Indian tribes now for over 17 years, and this bill, in my opinion, has had more imput and more review by the members of the Sisseton-Wahpeton Sioux Tribe than probably any like legislation that has affected the specific interests of one tribe. Specifically, the tribe not only held public heaings in front of the tribal council and public debate in front of the tribal council in three successive tribal administrations—and each tribal council in those three successive administrations has strongly endorsed this legislation and has asked the South Dakota congressional delegation to support it. In addition to that, the tribal community is divided into seven discrete political districts.

In 1981 the tribal chairman and myself made a circuit of each of the seven political districts at well-advertised public hearings to which numerous tribal members attended. This bill was explained line by line, section by section to the members of the tribe at these various public hearings. The members made numerous suggestions for changes in the language of the bill, and the changes are reflected in the bill that is now before the committee.

Senator ANDREWS. Mr. Hirsch, what efforts have been made to gain input from the departmental personnel on this legislation?

Mr. HIRSCH. The tribe, Mr. Chairman, started to develop this bill in 1978. At that time, probably the first person that had contact with the tribe on this was Don Jensen who, as you may know, was the head of the realty office in the Aberdeen area office of the BIA for many, many years.

Senator ANDREWS. So this bill comes as no surprise to the Department?

Mr. HIRSCH. No.

Senator ANDREWS. In fact, they have been in on it?

Mr. HIRSCH. In fact, Legislative Counsel's Office of the Department of the Interior had input into this bill back in 1979 and 1980. The BIA at the agency, area, and central office had input into this bill at that time. This bill is not only a distillation of the opinions and suggestions and recommendations for legislation of members of the tribe, but it also attempts to incorporate the kinds of approaches to this problem that were recommended by the Bureau of Indian Affairs, by the Department's Office of Legislative Counsel, and by the Department's Office of the Solicitor. We have had tremendous amounts of input from the Government on this.

I might add, Mr. Chairman, that we have had the benefit over a number of years of time of the advice and assistance of the committee staff of this committee, as well as the committee staff of the House Interior and Insular Affairs Committee, who made numerous recommendations with respect to how to handle this problem for the Sisseton-Wahpeton Sioux Tribe. Those recommendations have also been incorporated into the bill pending before you.

Senator ANDREWS. Well, Counselor, how about the letter we have received from Delbert Hawkins, who is the chairman of the Enemy Swim District, and Kenny Seaboy, who is a councilman of the Sisseton-Wahpeton Sioux Tribe pointing out that they support the main provisions contained in this legislation but they strongly object to the clause pertaining to the escheat of lands less than 2½ acres in size to the tribe? They find it discriminatory that non-Indians can own a tract of land 2½ acres in size or smaller while "* * * we on this reservation are prevented from doing the same." What about that?

Mr. HIRSCH. Well, curiously enough, the Indian Land Consolidation Act passed by the Congress which became law last year, has more onerous provisions than our bill because the Indian Land Consolidation Act for a 160-acre allotment, which is the typical size of allotments at Sisseton, would permit an escheat of as large an area as 3.2 acres, not 2½ acres.

Senator ANDREWS. You do not excuse one onerous provision by saying that there are others. There seem to be no end of onerous provisions in Indian law, at least pertaining to the Indians, and there always seem to be great, huge loopholes taking care of the non-Indians. It looks like this is one of those.

Mr. HIRSCH. Well, I would agree with you if the provision were onerous. However, the Enemy Swim District was one of the districts at which I, myself, and a tribal chairman 2 years ago held a hearing. The members of the district were present. I frankly do not recall if Mr. HAWKINS was. He was not chairman of the district at that time. The district unanimously supported the legislation in a vote, and they are on record as unanimously urging the tribal council to support this legislation.

With respect to Mr. Seaboy, I might add that Mr. Seaboy has been on the tribal council now for several years and on every single occasion when this legislation came up for a vote by the tribal council, Mr. Seaboy voted in favor of the legislation, including the escheat provisions.

Senator ANDREWS. Are you saying that Mr. Seaboy speaks with forked tongue?

Mr. HIRSCH. No. I am saying that Mr. Seaboy may have changed his position; but in terms of his public acts as a legislator for the tribe, as a member of the council, in his recorded votes he certainly has voted in favor of this legislation on several different occasions and has never taken any action to have his vote recorded otherwise.

Senator ANDREWS. Thank you very much, counselor.

[The material follows. Testimony resumes on p. 105.]

PREPARED STATEMENT OF BERTRAM E. HIRSCH, ATTORNEY, ON BEHALF OF THE SISSETON-WAHPETON SIOUX TRIBE

Mr. Chairman and members of the Committee, my name is Bertram E. Hirsch. I serve as General Counsel to the Sisseton-Wahpeton Sioux Tribe and am appearing today on the Tribe's behalf. Russell Hawkins, the Tribe's Chairman, and other tribal representatives had intended to present this testimony but, due to the untimely death of a prominent member of the Tribe, are unable to do so.

Enactment of S. 2663 is vital to the interests of the Tribe and its members. The legislation, originally introduced in similar form by Congressman Daschle during the 96th Congress in 1980 (H.R. 8418), primarily seeks to provide mechanisms to eliminate fractionated heirship problems within the original boundaries of the Lake Traverse Indian Reservation.

The Tribe's fractionated heirship problems find their origin in the General Allotment Act of 1887. Under this Act, the Sisseton-Wahpeton Sioux Tribe was one of the first Tribe's to experience allotment. Commencing in 1887 and concluding in 1894, the Lake Traverse Indian Reservation was carved into 1,369 individual allotments with the lands surplus to allotment being sold to non-Indian settlers.

During the last 100 years, the original allotments have passed to successive generations of heirs. The heirs of the original allottees own an ever diminishing fractional interest in the original allotment. The fractionation process is illustrated by the "Profile of Lake Traverse Reservation Fractionated Tracts," appearing on the next page.

Profile of Lake Traverse Reservation
Fractionated Tracts of land

SW 1305 JOSEPH RENVILLE - AKIPA - Annual rental $1,100.00
464 Heirs, 98 heirs receive 0¢ and 340 receive less
than $1.00. largest share holder receives $128.05.

SW 255 ABIGAIL CRAWFORD - Annual Rental $2,548.00
430 Hiers, 10 heirs receive 0¢ and 216 receive less
than $1.00. largest share holder receives $90.23

SW 433 CEKPAWIN - Annural Rental $2,627.00
341 heris, 169 heirs receive less than $1.00
Largest share holder receives $205.54.
SW 1349 GABRIEL RENVILLE (TIWAKAN) - $215.00 annual rental
337 heirs, 75 receive 0¢ and 289 receive less
than $1.00. Largest share holder receives $14.17.

SW 1352 HOKSINAWASTE (GOODBOY) - Annual Rental $600.00
374 heirs, 12 heirs receive 0¢ and 276 receive less
than $1.00. Largest share holder receives $34.44.

SW 102 AGNES INIHAN - Annual Rental $320.00
224 heirs, 161 receive less than $1.00.
Largest share holder receives $40.95.

SW 625 HAPISTINA - Annural Rental $600.00
270 heirs, 22 receive 0¢ and 234 receive less than
$1.00. Largest share holder receives $32.30

SW 714 MARY FRENIER - Annual Rental $6,400.00
314 heirs, 62 heirs receive less than $1.00.
Largest share holder receives $355.56

SW 782 TATEWICUWA - Annural Rental $270.00
300 heirs, 10 receive 0¢ and 232 receives less than
$1.00. Largest share holder receives $27.16.

SW 990 JOSEPH LABLANC - Annural Rental $1,275.00
247 heirs, 141 receive less than $1,00
Largest share holder receives $278,91.

It is apparent that hundreds of heirs of original allottees gain virtually nothing from their interest in the original allotment. In addition to the particular allotments highlighted in the Profile, the BIA estimates that all allotments within the Lake Traverse Reservation average some thirty heirs. To administer the fractional interests of the heirs of the original allottees, the BIA maintains 5,893 individual accounts for members of the Tribe and others, costing, according to the Sisseton Agency, approximately $50.00 per account annually.

The high degree of fractionation renders it impossible for most of the heirs to make any beneficial use of their fractional interest. Consequently, the BIA leases the allotments and distributes the piddling rental income to the heirs.

In order to assist the members of the Tribe to make commercial, agricultural, homestead and other beneficial use of the original allotments, as intended by the General Allotment Act, the Tribe began to explore a legislative solution to the fractionated heirship problem as early as 1978. Since that time, the legislation that has emerged as S.2663 has received endorsement from three successive tribal councils. The legislation was also the subject of thorough public hearings held in the seven communities of the Tribe during 1981. The BIA, at the Agency, Area and Central offices, has had extensive input into the legislation, as has the Department of the Interior's Office of Legislative Counsel and the Solicitor's Office.

S.2663 was also developed with the cooperative assistance of the staff of this Committee and the assistance of the staff of the Committee on Interior and Insular Affairs of the House of Representatives. The legislation is supported by the Tribe and its members.

During the 97th Congress, the Tribe was urged to hold up on seeking introduction of the legislation on the premise that the Indian Land Consolidation Act, then under consideration, would provide the Tribe with the mechanisms necessary to eliminate fractional heirship interests. The Indian Land Consolidation Act became law on January 12, 1983. Unfortunately it does not address the fractionated heirship issue in a way that will effectively resolve the problem for the Tribe and contains certain provisions not acceptable to the Tribe or its members. As a result, the Tribe has renewed its effort to obtain enactment of S. 2663.

S.2663 contains the following major provisions: Section 2 restricts inheritance to enrolled tribal members. While the Tribe can obtain such a restriction by implementing 25 U.S.C. §2205, the proviso clause of §2205 contains conditions and restrictions not acceptable to the Tribe. For example, S. 2663 would permit nonmember surviving issue of children to acquire a life estate. Section 2205 does not recognize such a right.

Section 3 of S. 2663 provides an order of intestate succession. The order is different from the order provided in currently applicable state law. The Indian Land Consolidation Act does not provide an order of intestate succession.

Section 4 of S. 2663 provides a life estate for surviving nonmembers of the Tribe. This is similar to 25 U.S.C. §2205, except that section 2205, as noted, contains conditions and restrictions not contained in S. 2663. Under section 2205, it is possible that a life tenant, who is a nonmember of the Tribe, could retain a permanent interest in the trust or restricted land if the Tribe fails to pay fair market value for the interest within a specified period of time. Under S. 2663, nonmembers can never obtain more than a life estate in such lands.

Section 4 also provides a method for determining the use of land by life tenants and the distribution of rental income to the life tenants. This provision is not provided for in any existing law.

Section 5 requires escheat to the Tribe of any interest in trust or restricted land that is less than two and one-half acres, whether the interest is inherited by devise or descent. This provision is similar to 25 U.S.C. §2206. Depending on the size of an allotment, Section 5 is broader or more restrictive than the 2% requirement in section 2206. The Tribe believes that a flat acreage approach is more appropriate to its circumstances. In particular, the Tribe supports two and one-half acre provision because this is the standard size of a rural homestead in the tribal community, HUD requires this amount of acreage as a homestead minimum, and because units of land of less amount are not legally describable by the fractional system employed in legal land descriptions. The Tribe is also convinced that inheritance of a lesser amount would permit the continuation of poor land use caused by fractionation, while escheat of a larger amount would be unfair to the heirs.

Section 6 provides that prohibited inheritances would escheat to the Tribe.

Section 7 is designed to facilitate partition of the allotments on the reservation. Under current practice, the BIA requires that 100% of the heirs consent before partition is permitted. It has been virtually impossible for members of the Tribe to obtain partition. The members have thus been prevented from making beneficial use of the land.

Section 8 would authorize the Tribe to exercise the power of eminent domain to condemn fractional heirship interests and develop tribal economy. Section 9 would provide the Secretary with the same authority.

Section 11 would require that the unclaimed or abandoned property of members of the Tribe, held by the United States, escheat to the Tribe.

In sum, enactment of S. 2663 would reduce the division of trust allotments into fractionated interests and the passing of allotments out of trust, and would enable the Tribe and its members to effectively use the trust lands in question. Since, under S. 2663, the provisions of the

Indian Land Consolidation Act not inconsistent with this legislation would continue to apply to the members of the Tribe, the two laws working in tandem should substantially eliminate the fractionated heirship problem within a generation.

The Tribe has actively sought this legislation for six years and has needed it for a far longer period. The legislation is vital to growth and development of the Tribe and its members.

The Tribe appreciates the opportunity to appear before the Committee today and is grateful to the Committee for its careful consideration of S. 2663.

Attached is a list, together with an explanation, of technical and other amendments to S. 2663 recommended by the Tribe after further review with tribal members, the Department of the Interior and Committee staff.

AMENDMENTS

The Sisseton-Wahpeton Sioux Tribe requests the following amendments to S. 2663:

1. On page 2, line 17 should be amended to delete the first "or" and in lieu thereof insert the word "and." This is a technical amendment that is necessary to properly express the intent and purpose of the section.

2. On page 2, line 21 should be amended to change the word "section" to the word "sections." This is an obvious technical amendment.

3. On page 3, line 25 should be amended to change "inlcude" to "include." This is a typographical correction. *

4. On page 5, line 12 should be amended to read: "for the appropriate enrolled heir member of the tribe under section 3 of this Act or the." This amendment, also technical, more precisely states the intent of the subsection.

5. On page 5, line 19 should be amended to read: "Act shall be subject to applicable regulations pertaining to the use of trust or restricted land and to the following conditions, restrictions." The amendment conforms to existing law by recognizing that the Secretary of the Interior has a responsibility to determine the use of trust or restricted land in cooperation with the beneficial users of such land.

6. On page 5, line 24 should be amended to insert before the word "land" the words "life tenant's interest in the." This is a technical amendment. The life tenant will inherit

*This amendment applies only to H.R. 5639.

only the decedent's interest in the land. The interest inherited may be an undivided interest in a fraction of an allotment.

7. On page 6, line 4 should be amended to read: "income from the lease or other use of the life tenants' interest in the land and." See amendment 6 for explanation.

8. On page 6, line 12 should be amended to read: "the lease or other use of the life tenants' interest in the land and such children." See amendment 6 for explanation.

9. On page 6, line 17 should be amended to insert before the word "survived" the words "without a surviving nonmember spouse but." This is a technical amendment that more accurately states the intent of the subsection.

10. On page 6, line 19 should be amended to insert before the word "land" the words "life tenants' interest in the." See amendment 6 for explanation.

11. On page 6, line 21 should be amended to insert before the word "survived" the words "without a surviving nonmember spouse but." See amendment 9 for explanation.

12. On page 6, line 25 should be amended to insert before the word "land" the words "life tenants' interest in the." See amendment 6 for explanation.

13. On page 7, line 2 should be amended to insert before the word "survived" the words "without a surviving nonmember spouse and nonmember children but." See amendment 9 for explanation.

14. On page 7, line 5 should be amended to insert before the word "land" the words "life tenants' interest in the."

See amendment 6 for explanation.

15. On page 7, line 14 should be amended to insert after the word "acres" the words "or the equivalent thereof." This is a technical amendment that reflects the fact that usually the interest inherited is an undivided interest in a fraction of an allotment.

16. On page 7, line 16 should be amended to change the word "interstate" to the word "intestate." This is a typographical correction.

17. On page 8, line 7 should be amended to delete the word "heir." This a technical amendment that recognizes the purpose of the section to make partition more readily available to tribal members, whether or not they are "heirs."

18. On page 8, lines 8 and 11, after the word "member" insert the words "or members." This is a technical amendment that more accurately states the purposes of the section to permit partition upon the request of one or more persons holding at least a fifty percent interest in the lands to be partitioned.

19. On page 8, line 11, the word "heir" should be deleted. This amendment conforms to and has the same purpose as amendment 17.

20. On page 8, lines 11 and 12 should be amended to delete the words "and without the necessity of obtaining the consent of any of the other heirs." This is a technical amendment that more precisely states the intent of the section to require the Secretary to partition lands upon the request of those holding at least a fifty percent undivided interest in

the land to be partitioned. The Tribe is concerned that the "without the necessity" language may permit the Secretary to require that consent be obtained from others holding an undivided interest in the land to be partitioned. The Tribe is interested in eliminating this kind of exercise of Secretarial discretion and in mandating that the Secretary partition land when a request is received in accordance with the provisions of this section.

21. On page 8, lines 18-21 should be amended to delete the "Provided further" clause and substitute in lieu thereof the following:

> Provided further, That whenever an enrolled member or members of the tribe requests partition, the fair market value of the lands remaining after partition shall not be less than the fair market value of the interest, prior to partition, of the owners of such lands. The person or persons requesting partition, in order to meet the fair market value requirement of this subsection, may relinquish to the other heirs a portion of their undivided interest in the trust or restricted lands to be partitioned.

The existing language of S. 2663 would permit partition in a way that could increase the fair market value of the undivided interest of those requesting partition while decreasing the fair market value of the undivided interest of those who are not participating in the partition. Upon further review and consideration, the Tribe does not believe that such an approach to partition is equitable. The proposed amendment would require that partition be achieved without diminishing the fair market value of the undivided interest held by those who are not participating in the partition. In order to accomplish this result, the proposed amendment provides that those requesting partition may obtain a division of the land that decreases the fair market value of the interest held by such persons prior to partition. Alternatively, those requesting partition, in order to achieve as equitable a division of the land as possible while partitioning the land as nearly as possible in the manner requested, may agree to permanently relinquish a portion of their undivided interest to those who are not participating in the partition. The proposed amendment is not intended to vest any discretion in the Secretary to determine whether the requested partition can be equitably achieved. The section mandates partition when requested by those holding at least a fifty percent undivided interest in the trust or restricted land to be partitioned.

22. On page 9, lines 6 and 7 should be amended to delete the words "Whenever the Secretary partitions land under this section" and to insert in lieu thereof the words "Within one hundred and eighty days after the Secretary, pursuant to subsections (a) or (b) of this section, receives a request to partition trust or restricted land." The purpose of this amendment is self-evident. The Sisseton Agency of the Bureau of Indian Affairs has informed the Tribe that 180 days is a sufficient time within which to perform the administrative tasks necessary to accomplish the partition authorized by this section.

23. On page 9, line 13 should be amended to delete the period and insert a comma in lieu thereof with the following proviso to be added after the comma:

> Provided, That the provisions of any law to the contrary notwithstanding, no patent in fee shall be issued for the lands partitioned under this section until the expiration of at least ten years from the date of issuance of such new trust patent.

Although the Tribe is interested in facilitating partition, the Tribe does not want partition to result in lands being removed from trust status. Specifically, the Tribe is concerned that non-Indians may induce members of the Tribe to request partition for the purpose of immediate sale to such non-Indians once partition is approved. By disallowing the issuance of a patent in fee for a period of at least ten years from the date of partition, the land base of the Tribe and its members can be properly protected.

24. On page 9, line 19 should be amended to change the word "uses" to the word "purposes." This is a technical amendment designed to conform to the language commonly used in the eminent domain context.

25. On page 12, line 1 should be amended to change the word "with" to the word "within." This is a typographical correction.

26. On page 13, Section 12 should be deleted. The Tribe is informed that since all lands and interests in lands acquired by the United States for the tribe or its members, under this legislation, is acquired in trust, the language of Section 12 is unnecessary. As a matter of existing law, all lands held for Indians in trust are exempt from nontribal taxation.

However, in order to avoid any construction that the deletion of Section 12 (or the inclusion of 25 U.S.C. §2210 in the Indian Land Consolidation Act while omitting a similar provision in this legislation) subjects the lands or interests in lands acquired in trust under this legislation, to nontribal taxation, the Tribe requests that Section 12 only be deleted if the deletion is clearly explained in the legislative history.

27. On page 13, line 15 should be amended to change "Sec. 13" to "Sec. 12." This amendment is necessary if Section 12 is deleted.

28. On page 13, line 20 should be amended to change "Sec. 14" to "Sec. 13." This amendment is necessary if Section 12 is deleted.

29. On page 13, line 24 should be amended to change the period to a comma and to add the following proviso clause after the comma:

> Provided, That this section shall not apply to invalidate the will of any person who because of unsound mind is unable to amend a will in order to comply with the provisions of this Act.

This amendment is necessary to protect the integrity of wills properly executed prior to the effective date of this Act. Under the proposed amendment, wills executed prior to or within 120 days after enactment of this Act would be valid, under the law applicable to such wills prior to the enactment of this Act, if the testator became non compos mentis prior to 181 days after enactment of this Act. If a testator becomes non compos mentis after 180 days after enactment of this Act, the proposed amendment would not render valid a will otherwise invalid under this Act.

30. A new section 15 should be added as follows:

> If any provision of this Act or its application to any person or circumstance is found to be invalid, the remainder of this Act, or the application of the provisions of this Act to other persons or circumstances, shall not be affected.

This is a standard severability provision. Since laws affecting property rights are often contested, prudence dictates the inclusion of this amendment.

31. On page 4, line 23 should be amended to change "wher-" to "when-". This amendment is a typographical correction.

1867 Treaty

Enemy Swim Tio-spa

June 5, 1984

The Honorable James Abdnor
United States Senate
Washington, D.C. 20510

Dear Senator Abdnor:

This letter is written on behalf of the Enemy Swim District concerning the bill, S 2663. Enemy Swim District is one of the seven districts which constitutes the Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation located both in South Dakota and North Dakota. This District represents 414 voters.

While we support the main provision contained in this legislation, we strongly object to the clause pertaining to the escheat of lands less than two and one-half acres in size to the Tribe. We find it discriminatory that non-Indians can own a tract of land two and one-half acres in size or smaller while we on this Reservation are prevented from doing the same.

Although we understand that the primary objective of the bill is to consolidate Tribal lands, we believe that it is possible to accomplish this purpose without taking away our rights to inherit lands. It would be greatly preferable to remove this clause altogether and thereby enable members of the Sisseton-Wahpeton Sioux Tribe to benefit from their tribal inheritance. If you need further information on this important matter, you can telephone me at 605/947-4170.

I look forward to your early reply so that I can communicate your position to our Tribal members and voters.

Sincerely,

Delbert Hopkins

(605) 947-4357

Delbert Hopkins, Chairman
Enemy Swim District

Kenny Seaboy

Kenny Seaboy, Councilman
of the Sisseton-Wahpeton Sioux Tribe

cc: Mark Andrews
Senate Select Committee on Indian Affairs

June 27, 1984

RECEIVED [illegible] 3 1984

Senator Mark Andrews
SH-724 Hart Senate Office Building
Wahsington, D.C. 20510

Dear Senator Andrews,

This letter is to clarify an apparent misunderstanding regarding H.R. 5639 and S. 2663 pertaining to the inheritance of trust or restricted land on the Lake Traverse Reservation, North Dakota and South Dakota.

It is our understanding that two members of the Enemy Swim District (one of seven political districts of the Tribe) wrote to you indicating opposition to the bill, further, their letter was sent on district letterhead.

We would like to point out that our district at no time, formally or informally, rejected the Heirship Legislation, nor did we authorize such a letter to be sent to members of Congress. We do not take issue with members of the Tribe voicing opposition to members of Congress on this legislation or any other piece of legislation in the Congress.

We, as Tribal legislators, are well aware of the legislative process, wherein legislative action seldom satisfies everyone, also we are cognizant of the fact that the legislators themselves do not always agree on legislation.

We further recognize the far reaching expanse of the Heirship Legislation and how it affects individual members of our Tribe. Because of the impact in alleviating multiple ownership and the impact to individuals, this legislation has been given a full hearing in all seven districts of the Tribe. In addition, the proposed legislation has had full concurrance of the elected Councilmembers and Executives of three separate Tribal administrations since 1978.

In conclusion, the Enemy Swim District has not opposed the legislation.

Sincerely,

	Hiram Owen	
Lillian Owen	Hiram Owen	Maynard Bernard
Councilperson	Councilperson	Councilperson
Enemy Swim District	Enemy Swim District	Enemy Swim District
Sisseton-Wahpeton Sioux Tribe	Sisseton-Wahpeton Sioux Tribe	Sisseton-Wahpeton Sioux Tribe

HEIRSHIP: THE INDIAN AMOEBA

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The supervision of trust land has been the most enigmatic feature of Indian administration during this century, and no aspect of this quandary has come under greater criticism than the so-called "heirship problem." The geometric growth of inherited interests in land allotments has led to the alienation and disuse of millions of acres of real property, and the burden of administrating and probating the estates of what is now the fifth generation of heirs to the ten million acres of allotted land that remains in Federal trust has become a bureaucratic nightmare without parallel.[1] Yet, historians of Indian policy have focused little attention on this issue.

The heirship problem is an outgrowth of the allotment policies of the nineteenth century. By granting land in severalty to a people whose cultural and religious attachment to land was based on a long tradition of communal use, the United States hoped to indoctrinate Native Americans to the European concept of private ownership, and thus expose them to the "civilizing" qualities thought to be inherent in tilling the soil. This experiment in social engineering found greatest expression in the General Allotment Act of 1887, or Dawes Act,[2] which provided, in effect, that every tribal member would eventually be given a tract of land to own in fee simple within the reserved areas their tribe had accepted in exchange for the vast territory they once occupied and defended, and would thus be fully entitled to all of the property rights and responsibilities of other citizens.

In order to ease the transition to propertied citizenship, the General Allotment Act provided that title to these allotments would be held in trust by the United States for twenty-five years, during which time the land could not be taxed, mortgaged, or sold without government consent. It was hoped that by the end of this probationary period the individual allottee would assume full responsibility for the land, learn to farm it, and come to know its market value. The statute also provided that if the individual owner died while the property was still in trust status, the estate would be divided among heirs according to the laws of descent and partition in the state or territory in which the land was located.[3]

In the tradition of Anglo-Saxon law, the probating of an estate is usually resolved by either physically dividing land among heirs, so that each parcel then becomes a seperate estate, or selling the property and dividing the proceeds, all in accordance with the local statute of succession or the instructions of the dedent's will. But in the case of Indian allottees the situation was made much more complex. The sale or disposal by will of a trust estate was prohibited by law until the early part of the present century, and then only with the approval of the Secretary of the Interior, who functioned as the line executive of the Indian Service. Physical partitioning was also judged impracticable since Indians commonly had large families, the members of which were legally considered "incompetent"to manage their own affairs, and since the resulting subdivisions would be much too small to be of economic use as farms or ranches, and thus could not fulfill the agrarian dreams of humanitarian policy makers. Instead, interests in allotments were merely divided on paper and continued in trust for the heirs, who were then placed in a position similar to tenants in common.[4]

The long term effect of these policies has been the progressive fractionation of ownership in those allotments for which the trust period has been extended. In the more than ninety years since the General Allotment Act, the original tracts had been subdivided numerous times on paper, equities have grown proportionately smaller as the number of heirs has increased, and individial tribal members who now have no land of their own have accumulated minute interests in scattered tracts of land, sometimes within several seperate reservations. The problem has mushroomed to the point that thousands of Indians are helpless to make effective use of their heirship lands.

The heirship problem and other encumbering aspects of the allotment policy, when coupled with the overwhelming demand of white settlers for reservation lands, compelled the United States to adopt a policy of land liquidation. Only in this way could the burden of administrating an impossible situation be reduced.

The General Allotment Act itself neglected the needs of future generations of tribal members and eliminated more than 60 million acres from Federal trust by providing that the "surplus" reservation land left after allotment be opened to white settlement. The granting of fee patents to tribal members arbitrarily judged to be "competent" prior to the end of the trust period resulted in the loss of another 23 million acres. Since fewer than 20 per cent of the Indians who received fee titles managed for long to retain ownership, this policy proved tantamount to outright alienation.[5] Pressure for the sale of the trust allotments led to legislation in 1902 which authorized the Secretary of the Interior to permit heirs to sell their inherited interests, and in 1906 Congress similarly authorized the Secretary to allow original allottees to dispose of their land.[6] By virtue of these two acts, another 3.7 million acres of trust land was alienated from Indian ownership.[7]

Finally, after more than 86 million acres of reservation land had passed out of the hands of tribal members, the United States government was compelled to acknowledge, in the early 1930s, that the allotment policy had failed as an assimilationist program to improve the lives of Native Americans. During the "Indian New Deal" administration of Commissioner John Collier (1933-1945), legislation was enacted to bring a halt to allotment, curtail the further alienation of trust land, and provide funds for consolidating the remaining Indian land base. Yet the haunted legacy of the heirship problem, second only to alienation among the evils wrought by allotment, has continued.[8]

Most historians who have studied the allotment policy also accept the judgement that it was a disastrous failure, although some have made a convincing argument that the reformers who formulated the policy were sincere in their motives to integrate tribal members into the mainstream of the dominant American society.[9] A recent cliometric study by economist Leonard A. Carlson gives emperical evidence to support the view that allotment served the economic interests of whites rather than Indians, and that tribal members were actually more successful as farmers before allotment than they were afterwards.[10]

The Lake Traverse Indian Reservation provides an excellent example of both the failure of the allotment policy and the continuing heirship problem. Established by the treaty of February 19, 1867 for members of the Sisseton and Wahpeton bands of the Santee Sioux tribe, the original triangular shaped reservation encompassed 918,779 acres in what is now the northeastern corner of South Dakota and a portion of southeastern North Dakota.[11]

The Lake Traverse or Sisseton Reservation, as it is often referred to, has the distinction of being the first reservation partioned under the General Allotment Act.[12] Out of the original acreage, 309,914 acres were allotted to individual tribal members by 1891, and the remaining

608,866 acres were declared surplus and sold to white settlers for $2.50 per acre.[13] At present only 108,2[illegible]9 acres remain in trust, or approximately 12 per cent of the original reservation land base.[14]

Prior to allotment the Sisseton and Wahpeton Sioux had developed a viable system of land tenure and had made measurable progress toward the goal of becoming self-sufficient farmers. In 1887 the tribe collectively cultivated 7,740 acres, harvested 9000 bushels of corn, and herded 450 head of cattle.[15] But the granting of land in severalty and the pro rata distribution of the proceeds from the sale of surplus lands combined to have a negative effect on the tribe. Land payments killed incentive for farming activities, children were called home from boarding schools to share the new wealth, and the government's so-called "civilization program ground to an abrupt halt. The rapid dissipation of the pro rata money, encouraged as it was by unscrupulous merchants, soon plunged the Sisseton-Wahpeton people into abject destitution.[16]

Allotment had vested these tribal members with a greatly encumbered property right. Under the original provisions of the General Allotment Act, their land could neither be leased, sold, nor devised by will. In the early 1890s, Sisseton-Wahpeton allottees begged permission to lease their lands to surrounding white farmers so that they might gain additional income from land they could not afford to develop themselves. In a region where drought and pestilence were commonplace, they reasoned that a fixed income was preferable to gambling against the forces of nature.[17] Similar requests from other tribes and the pressure of land-hungry whites led Congress in 1891 to authorize the Secretary of the Interior to approve the leasing of allotments at his discretion.[18]

Congressional proponents of leasing argued that Indians would be motivated by observing the successful operations of white farmers on a portion of their land, and that lease income would permit tribal members to make improvements on the remainder of their allotments. Instead, leasing gave further encouragement to idleness and rapidly transformed allottees and their heirs into "a race of petty landlords" accustomed to subsisting on the meager pittance of unearned income derived from their real property assets.[19] By 1900, over half of the Sisseton-Wahpeton tribal members were living solely off their lease money, and only 4,000 acres were being cultivated by Indians, or 52 per cent less than in the pre-allotment year of 1887. By 1927, over 107,000 acres of allotted land were being leased to whites and only 3,100 acres were planted by tribal members.[20]

Leasing served to further complicate an emerging heirship problem. If the original allottee had died, the proceeds of the lease had to be divided among the heirs according to their fractional interest in the estate. The execution of the lease itself also required the consent of all the heirs. As heirs of heirs died and family members inherited ever smaller equities in scattered tracts of land, leasing became the only viable option for making effective use of their interests. Yet, heavily fractionated allotments tended to discourage potential lessees because of the difficulty of obtaining heir consent. By 1935, 92 per cent of the Lake Traverse Reservation was in heirship status, so heavily divided as to be virtually useless to any single tribal member. At least 25,000 acres were left idle because lessees declined to search out heirs, and the cost absorbed by the Office of Indian Affairs in obtaining signatures of heirs generally exceeded the value of the lease.[21]

In combination with the brisk sale of allotments and inherited interests after 1906, the leasing of heirship lands turned Indian administration into a giant real estate and banking enterprise. The broad powers of the Secretary of the Interior over Indian lands were delegated to Agency Superintendents, and proceeds from the sale or lease of trust lands were likewise kept in trust by the United States in Individual Indian Money (IIM) accounts. Thus at Lake Traverse, as elsewhere, the notification of heirs, the negotiation of land sales and lease agreements, the securing of signatures, the collection of rentals, the determination of equities, the distribution of checks, and the endless communication with tribal members, white farmers, other reservations, the Area Office, and Washington regarding the current status of land and money became the daily drudgery of a corps of agency personnel.[22]

By statute the Secretary of the Interior is charged with the responsibility of determining the heirs of Indian trust estates and, since 1910, with the duty of probating the wills of tribal members. To accomplish this task, a probate division was established within the Office of the Solicitor, the legal branch of the Interior Department, and the Secretary's powers were delegated to regional Examiners of Inheritance, who conduct the actual probate hearings. Departmental regulations require that hearing notices be mailed to all heirs, devisees, witnesses, and creditors, and be posted in at least five public places. As previously noted, the state law of descent and partition is usually followed, except that the Examiner is obligated to follow the custom of the tribe on inheritance, if such custom is established. Likewise, a marriage must be recognized whenever a man and woman cohabitate according to tribal custom, the children of that union must be judged legitimate heirs, and a seperation viewed by the tribe as a divorce must be similarly recognized by the Examiner.[23]

Sisseton-Wahpeton Allotment No. 1305 on the Lake Traverse Reservation provides an extreme example of the present complexity of the heirship problem -for it may well be one of the most fractionated parcels of land in the world. The original allottee, a member of one of the most prominent and prolific Sisseton families, died in 1891. By 1937 there were 150 heirs to the allotment and probating the estate cost $2,400 and required more than 250 typewritten pages.[24] At present there are 439 heirs and the lowest common denominator (LCD) used to determine fractional interests is 3,394,923,840,000.[25]

A portion of the allotment consisting of forty acres of farmland is currently leased at the rate of $1080 per year. When it comes time to distribute this money, it requires three full days for a realty clerk to calculate the heirship interest values. A breakdown of the current lease distribution reveals that more than two-thirds of the heirs receive less than $1.00 per year from the estate, that approximately one-third receive less than 5¢, and that the interest of 100 of the heirs entitled them to a fraction of 1¢. The largest interest holder receives $82.85, but the value of the smallest heir is $.0000564. At the current lease rate, it would require 177 years for the smallest heir to earn 1¢, and 88,652 years to accumulate $5.00, which is the minimum amount for which the Bureau of Indian Affairs will issue a check. If this portion of the allotment was sold at its appraised value of $8000, the share of the smallest heir would be $.000418, and if it were physically partitioned, the smallest heir would be given title to approximately 13 square inches.[26]

A statistical analysis of thirty of the most heavily fractionated allotments on Lake Traverse reveals that the average estate has 196 heirs, and that the average heir holds interests in 14 other allotments. If these tracts were sold, the average payment to the smallest heir would be 36¢, and if partioned the smallest heir would be entitled to 174 square feet. At the current average lease rate it would require the smallest heirs an average of 1344 years to realize $5.00 from these estates.[27]

The management of such infinitesimal heirship interests constitutes an enormous administrative burden on the Bureau of Indian Affairs. On the comparatively small Lake Traverse Reservation it requires the full attention of five realty and probate specialists to oversee the 86,586 acres now in heirship status, the overwhelming proportion of which are leased to non-Indians. In 1981 these individuals handled the documentation and accounting for 2000 leases and 40 probate hearings. By their estimate it cost approximately $40 per heir to transact an allotment lease. This means that the Bureau of Indian Affairs will expend $17,560 per year to administrate the current lease on the highly fractionated Allotment No. 1305, which will bring in a total revenue of only $1080 for the heirs.[28]

Calculation of the lowest common denominator (LCD) of interest in an estate requires the use of a specially programmed fifteen digit calculator. But even the BIA's master computer has not been able to accurately determine the LCD for Sisseton-Wahpeton Allotment No. 255, which has 427 heirs, and Allotment No. 1352, with 395 heirs, and Agency personnel must estimate the approximate distribution of lease money.[29]

Present regulations require the consent of a majority of heirs to lease an allotment and unanimous approval to sell, and proceeds must be distributed to all.[30] The problem of locating heirs has become an especially difficult task. Of the 7080 Indians enrolled in the Sisseton-Wahpeton Tribe, only 3945 actually reside on or near the reservation, and the remainder are scattered throughout the United States and Canada.[31] Members of other tribes and non-Indians also comprise a significant proportion of the heirs. Of the thirteen new allotment heirs determined by one probate hearing, nine lived off the reservation in six different states.[32] Out of a total of 154 interests in another allotment, 15 were held by non-Indians, including a 1/24 interest devised by will to Oregon State University.[33]

Because the value of heirship euities is assumed to be low, distant heirs tend to ignore Agency inquiries regarding their inherited interests. Canadian heirs have been extremely hard to track down, and at one time the Sisseton Agency held more than $100,000 on deposit for Canadian and non-Indian heirs who either could not be located or refused to respond. Children adopted out of the tribe have also posed a problem, and in one case it took Agency personnel four years to get a response from guardians of a minor heir entitled to more than $16,000.[34]

Probate hearings at Lake Traverse, held once a year, are complicated by variations in the inheritance laws between North Dakota and South Dakota. In North Dakota, for example, the spouse must inherit at least half of the estate and children adopted out of the family are not recognized as heirs. In South Dakota the spouse may receive as little as a third of the property and children with other legal guardians are still considered legitimate heirs. Since many decedents hold inherited interests in both states, this requires a seperate determination of heirs and distribution of interests for allotments on one side or the other of the state line. Although traditionally few tribal members have executed wills devising designated tracts of land to specific heirs, this practice seems to be increasing because of the heirship problem.[35]

Each year the Sisseton Agency witnesses an increase in the number of documents required to maintain current land records, in the number of probate hearings, in the calculations needed to determine common denominators, and in the amount of time and money expended on heirship inquiries. And the problems are increasing in geometric proportion. One allotment gained 76 new heirs in a 30 month period, and one tribal member has now inherited interests in 40 seperate allotments on the reservation. This administrative labyrinth is further complicated by the fact that on some allotments mineral interests have followed a different line of inheritance than surface interests.[37]

The problem of Indian heirship has been recognized by the Federal government since at least 1926. In that year Interior Secretary Hubert Work commissioned the Institute of Government Research, a forerunner of the

Brookings Institution, to conduct a comprehensive study of reservation conditions and the effectiveness of Federal Indian administration. Because the research was directed by economist Lewis Meriam, the results of the study, published in 1928 as *The Problem of Indian Administration*, has become more commonly known as the Meriam Report.[38]

As a solution to the heirship problem, the Meriam study recommended that the government establish a revolving fund which would permit tribes to purchase inherited interests and consolidate fractionated allotments into economically workable units.[39] In response to these suggestions, a proposal was made to the Hoover Administration to allow tribes to purchase heirship lands on a deferred payment basis, with the United States holding the mortgages. Even though this plan would have cost only $100,000 a year, the fiscal constraints of the Great Depression precluded its implementation.[40]

The Meriam Report set the stage for the major policy reforms of the New Deal established under the auspices of Indian Commissioner John Collier. Although the major thrust of the Indian Reorganization Act of 1934 was the partial restoration of tribal sovreignty, it provided far more extensive plans for land consolidation and economic development than those envisioned by Meriam. It repealed the allotment policy, established a $10 million revolving loan fund for the purchase of land that had gone out of trust, and provided for the return to the tribes of "surplus" lands that had not been homesteaded by whites.[41]

By allowing tribes to purchase heirship and non-trust tracts and exchange tribal land for interests in fractionated allotments, these reforms held out hope for successful land consolidation programs and an eventual solution to the heirship problem. But the promise of the Indian New Deal was never fully realized, again because adequate Federal funding was not forthcoming.

Fully wedded to the concept of self-determination, the Indian Reorganization Act was unique in that it only applied to those tribes who voted to accept its provisions. For a variety of reasons, it was rejected by nearly 40 per cent of America's tribal members. On the Lake Traverse Reservation, where white envelopment and forced assimilation had taken its toll on tribal unity, the Sisseton-Wahpeton Sioux snubbed the legislation because of fears that it might allow a minority faction to control reservation politics. Unfortunately, this valid objection to the tribal government provisions of the Act dashed any immediate hopes of solving the heirship land problem.[42]

In 1937, Assistant Secretary of the Interior Charles West proposed that the Lake Traverse Reservation be made a pilot study for land reform. Several bills to this effect were introduced in Congress, but all either died in committee or were killed on the floor.[43] A 1938 conference on Indian land problems held at Glacier Park, Montana also singled out Sisseton as an Agency where the administrative problems of heirship were particularly complex. This three-day seminar, attented by Commissioner Collier, Associate Solicitor Felix Cohen, and other Indian New Deal policy makers, ended up recommending as a solution that inheritance be limited to lineal rather than collateral heirs, that the rights of certain spouses be limited to life use, and that the alienation of inherited trust land be made much more difficult to accomplish.[44]

The suggestions of the Glacier Park conference were never enacted. Indian affairs were largely neglected during World War II,and the 1950s witnessed what may fairly be described as the most confused era of Indian administration during this century, as Congress attempted to terminate Federal services to tribes. In 1960, the House Committee on Interior and Insular Affairs undertook a comprehensive study of the heirship problem in anticipation of formulating corrective legislation. It subsequently published a thorough analysis of its findings, which included a sampling of 9000 heirs, in two volumes. This research brought the problem into focus for Congressional review and enunciated the "rule of heirship land," i.e., that increased fractionation equals increased Federal administrative costs and decreased heir income.[45]

Congress tried desperately during the 1960s to enact heirship legislation which would provide adequate safeguards for individual property rights and prevent indiscriminate alienation, and yet give the Bureau of Indian Affairs enough flexibility to act in the best interests of individual heirs. The House Subcommittee on Indian Affairs wanted to increase the constraints on individual property rights and expand administrative discretion in the issuance of fee patents to heirs. The Senate Subcommittee preferred to increase the scope of private property rights and provide increased funding for land consolidation, while also expanding admininistrative discretion where it would best serve tribal members. The Bureau of Indian Affairs ultimately failed to endorse any of the Congressional initiatives, and provided instead that the Secretary of the Interior be given broad power to allow tribes to purchase title to idle or unproductive heirship tracts on the installment plan through the issuance of "certificates of indebtedness," which would evidence the tribe's obligation to pay heirs their proportionate shares of the appraised market value of the allotments.[46]

The Senate doubted the efficiency of tribal ownership under the BIA's plan,and raised the question of whether these certificates might not also become a part of the heirship tangle. The Justice Department also ruled that the scheme would violate the vested property rights of individual owners by failing to provide full and just compensation prior to divesting them of their title equities.[47]

Although the Bureau of Indian Affairs had long advocated a rule of primogeniture which would cut off all heirs who did not have a minimum value and permit estates to pass to a single heir or escheat to the tribe, it declined to to support such legislation when it was introduced in 1966. It proposed instead an alternative primogeniture policy based on a minimum fraction of ownership, the involuntary exchange of certain interests, and the establishment of an increased loan fund for land consolidation. Unable to agree with this approach, Congress, since the 1960s, has made no discernible progress toward solving the heirship problem.[48]

An ideal solution to the Indian inheritance dilemma would protect the equity of all heirs and guarantee the realization of a fair market value for their vested property right. An ideal solution would likewise retain tribal control over the land and permit it to be put to its most productive use. From the standpoint of Federal administration, an ideal solution would also save taxpayer's money by reducing the costs of managing trust land.[49]

It seems reasonable to assume that in the more than fifty years that heirship has been recognized as a serious problem, the government could have effected reforms which would protect individual equities, promote tribal control and utilization of the land, and reduce administrative costs. Yet, the obstacles have been many, and even the three major ingredients of an ideal solution tend to conflict with each other. Restricting the sale of heirship land to the tribe or tribal members, for example, limits the market so that individual heirs are less apt to realize an equitable price.[50]

The major obstacle to solving the heirship problem is money. Indian heirs rarely have the cash or credit to settle estates when they cannot be physically partioned, and tribes have only limited financial resources with which to purchase inherited interests. Congress could make a giant step toward heirship land reform by greatly increasing the revolving loan fund available to tribes for land consolidation, or at least guaranteeing commercial loans.[51] In the long run, an outright grant to the tribes for the purchase of heirship tracts might prove less expensive than the administrative costs which the government will have to absorb between now and the end of the century if the problem is not resolved.

Inertia also works against a solution to the fractionated land problem. Since the Bureau of Indian Affairs has grown accustomed to its heirship burden, and since it bears the responsibility and costs of administration, there is little incentive for heirs to demand reform. Yet, any attempt to resolve the issue by limiting the number of persons entitled to inherit would be resisted by prospective heirs. Even though the value of their interests may be paltry, forced disinheritance would only create resentment and, ideally, should therefore be avoided.[52]

Legislation relaxing the present unanimous consent requirement for the sale of heirship land and granting tribes the power to condemn fractionated tracts for the benefit of the tribe, would provide a simple and inexpensive remedy for many land consolidation problems. However, the consent of a reasonable number of heirs (perhaps a simple majority) should be required for any conveyance, and all sales should be limited to the tribe or tribal members, so that the land may contunue to be held in trust.[53]

In testimony before a hearing of the Senate Subcommittee on Indian Affairs in 1961, Assistant Interior Secretary John A. Carver Jr. explained that a solution to the heirship quandary had not yet been found, because "the problem is so big and involves so many aspects, that you can't get everybody to agree on something that is going to solve all of it." [54] Indeed, the solons that Mr. Carver addressed that day failed to provide a solution for any of it. Yet, if the problem is that amorphous and a remedy that elusive, perhaps it would be best for Congress to focus on the particular needs of individual tribes rather than attempt to provide a general legislative solution.

Acting on its own initiative, and without benefit of the provisions of the Indian Reorganization Act, the Sisseton-Wahpeton Sioux Tribe has made a valiant attempt, though somewhat belated, to establish a land consolidation program. Legislation in 1974 permitted the tribe to acquire land within the reservation that had gone out of trust, and eliminate heirship interests in individual tracts by purchase or exchange. [55] Since then, nearly 20,000 acres have been added to the tribally owned land base.[56]

The Sisseton-Wahpeton Sioux Tribe has also proposed special legislation aimed at resolving its heirship land problem. Recognizing that Congress has been unwilling to provide the funding needed to bring about an ideal solution, the tribal council, in collaboration with New York attorney Bertram E. Hirsh, has drafted a bill that would limit descent and distribution while making it easier for the tribe to acquire title to heirship land.

Under this proposal, inheritance would be limited to lineal descendents who are also enrolled members of the tribe, under a special formula of distribution, with at least half of the estate going to the spouse. Those whose interest in an allotment amounts to less than 2 1/2 acres would be disinherited, and the number of heirs in any one tract would be limited to 15. The interests of those who died without heirs, those whose interest amounts to less than 2 1/2 acres, those who cannot be found within three years, and those otherwise disinherited by the bill, would escheat to the tribe. The tribe would also have broad power to condemn heirship tracts and levy inheritance taxes. The consent of only 50 per cent of the heirs would be required to partition an allotment, and the property right of the inherited interests of non tribal members would be limited to life tenancy.[57]

This legislative proposal, which embodies a number of previously suggested remedies, falls short of an ideal solution because it would arbitrarily disinherit hundreds of current and prospective heirs. Yet, over time, it should certainly work to increase the useable tribal land base and reduce the cost of Federal administration. Given the complexity of heirship issue, and the failure of Congress to provide more than an extensive investigation of the problem over the last half century, perhaps this is the best that can be hoped for.

NOTES

[1] The BIA presently administers a total of approximately 52,350,255 acres of trust land, of which 41,856,465 is held by tribes, 10,033,480 is individually allotted, and 460,310 supports government facilities. U.S., Department of the Interior, Bureau of Indian Affairs, Office of Trust Responsibilites, *Annual Report of Indian Lands, September 30, 1980*, compiled by Sandra R. Wilkins, p. 1.

[2] *Act of 8 February 1887*, *Statutes at Large* 24:388 (1887).

[3] Ibid. For a general history of the Dawes Act see D. S. Otis, *The Dawes Act and the Allotment of Indian Lands*, edited by Francis Paul Prucha (Norman: University of Oklahoma Press, 1973), and Wilcomb E. Washburn, *The Assault on Indian Tribalism: The General Allotment Act (Dawes Act) of 1887* (Philadelphia: J.B. Lippincott Co., 1975).

[4] U.S., Congress, House, Committee on Interior and Insular Affairs, *Indian Heirship Land Study*, House Committe Print No. 27, 86th Cong., 2d sess., 1961, vol. 1, p. 1; U.S. Congress, Joint Economic Committee, Subcommittee on Economy in Government, *The Heirship Land Problem and its Effect on the Indian, the Tribe, and Effective Utilization*, by Stephen A. Langone, in *Toward Economic Development for Native American Communities, A Compendium of Papers*, Joint Committee Print, vol. 2 (Washington: Government Printing Office, 1969), p.522.

[5] U.S., Department of the Interior, Natural Resources Board, Indian Land Tenure, Economic Status, and Population Trends, Part X of The Report on Land Planning (Washington: Government Printing Office, 1935), p.6.

[6] Act of 27 May 1902, Statutes at Large 32:245 (1902); Act of 8 May 1906, Statutes at Large 34:182 (1906).

[7] Natural Resources Board, Indian Land Tenure. pp. 6, 15.

[8] For a history of Indian New Deal reforms see Kenneth R. Philp, John Collier's Crusade for Indian Reform, 1920-1954 (Tucson: University of Arizona Press, 1977), pp. 113-186, and Graham D. Taylor, The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-1945 (Lincoln: University of Nebraska Press, 1980).

[9] See, for example, Henry E. Fritz, The Movement for Indian Assimilation (Philadelphia: University of Pennsylvania Press, 1963), Robert Mardock, The Movement for Indian Reform (Columbia: University of Missouri Press, 1971), and Francis Paul Prucha, American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900 (Norman: University of Oklahoma Press, 1973).

[10] Leonard A. Carlson, Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming (Westport, Conn.: Greenwood Press, 1981).

[11] U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Authorizing the Sisseton and Wahpeton Sioux Tribe of the Lake Traverse Reservation to Consolidate its Landholdings in North Dakota and South Dakota*, S. Report 93-982, 93d Cong., 2d sess. (1974).

[12] Carlson, *Indians, Bureaucrats, and Land*, p. 64; Stanley Norman Murray,"A Study of Indian Land Relations as Illustrated Through the History of the Lake Traverse Reservation Sioux (M.S. thesis, University of Wisconsin, 1953), p.187.

[13] S. Rept. 93-982 (1974)

[14] U.S., Department of the Interior, Bureau of Indian Affairs, Aberdeen Area Office, Branch of Real Property Management, *Annual Report of Caseloads, Acreages Under BIA, and Surface Leasing: Sisseton Agency, October 1, 1981*.

[15] Murray, A Study of Indian Land Relations," p. 197.

[16] Ibib., p. 191; Carlson, *Indians, Bureaucrats, and Land*, pp. 118-19, 137; Roy W. Meyer, *History of the Santee Sioux: United States Indian Policy on Trial* (Lincoln: University of Nebraska Press, 1967), p.217.

[17] Murray, ibid., p. 192; Meyer, ibid., p. 319.

[18] *Act of 28 February 1891, Statutes at Large* 26: 794 (1891).

[19] Natural Resources Board, *Indian Land Tenure*, pp. 2, 7.

[20] Murray, "A Study of Indian Land Relations," pp. 197, 232; Meyer, History of the Santee Sioux, p. 219.

[21] Meyer, ibid., pp. 327, 332; Burt Edward Powell, "Land Tenure on Northern Plains Indian Reservations" (Ph.D dissertation, Duke University, 1975), p. 338.

[22] Natural Resources Board, Indian Land Tenure, p. 21.

[23] Ethel G. Williams, "Too Little Land, Too Many Heirs: The Indian Heirship Land Problem," Washington Law Review 46 (1971), pp. 721-22; Lewis Meriam, et. al., The Problem of Indian Administration, Institute for Government Research (New York: Johnson Reprint Corporation, 1971), reprint of 1928 edition with a new introduction by Frank C. Miller, pp. 787-88; House Committee Print No. 27, Indian Heirship Land Study (1961), p. 2.

[24] Meyer, History of the Santee Sioux, p. 532.

[25] Lease No. 35205, Allotment No. 1305, BIA Realty Records, Sisseton Agency, South Dakota.

[26] Ibid.; Interview with Shirley De Couteau, Realty Specialist, BIA, Sisseton Agency, South Dakota, 9 February 1982.

[27] These calculations are based on data drawn from Land Indexes, Title Status Reports, and Probate Records maintained by the Titles and Records Section of the Aberdeen Area Office of the Bureau of Indian

Affairs, hereinafter referred to as TRS, AAO, BIA.

[28] Shirley De Couteau, interview; Interview with Marvin Olson, Trust and Natural Resources Manager, BIA, Sisseton Agency, South Dakota, 9 February 1982; Interview with Lesley Adams, Probate Clerk, BIA, Sisseton Agency, South Dakota, February 9, 1982.

[29] Ibid.; Title Status Reports Nos. 342-255, 342-1352, and 342-782, TRS, AAO, BIA.

[30] Title 25, *Code of Federal Regulations*, Parts 121.17, 131.2, and 131.6.

[31] U.S., Department of the Interior, Bureau of Indian Affairs, Aberdeen Area Office, *Aberdeen Area Tribal Directory*, 1981, p. 12.

[32] Probate No. TC-261R-77, TRS, AAO, BIA.

[33] Title Status Report No. 347-1284, TRS, AAO, BIA.

[34] Shirley De Couteau, interview.

[35] Lesley Adams, interview.

[36] Title Status Report No. 347-782, TRS, AAO, BIA

[37] Marvin Olson, Shirley De Couteau, interviews.

[38] Meriam, et. al., *The Problem of Indian Administration*, p. ix.

[39] Ibid., pp. 41, 473-74.

[40] Powell, "Indian Land Tenure on Northern Plains Reservations," pp. 339-40; U.S., Congress, Senate, Committee on Interior and Insular Affairs, Purchase of Allotments of Deceased Indians, S. Rept. 1203, 72d Cong., 2d sess. (1933).

[41] Indian Reorganization Act, Statutes at Large 48:984 (1934).

[42] Meyer, History of the Santee Sioux, pp. 321, 323; Murray, "A Study of Indian Land Relations," pp. 227-28.

[43] Meyer, ibid., p. 333.

[44] Resume of Proceedings, Conference on Indian Allotted and Heirship Land Problem, August 14-17, 1938, Glacier Park, Montana, Department of the Interior Library, Washington, D.C.

[45] House Committee Print No. 27, Indian Heirship Land Study (1961), pp. xiii, xv.

[46] Powell, "Land Tenure on Northern Plains Reservations," pp. 348-50. The seperate approaches of the House, Senate, and BIA are evident in U.S., Congress, Senate, Committee on Interior and Insular Affairs, Indian Heirship Land Problem: Hearings before the Subcommittee on Indian Affairs, 87th Cong., 1st sess. (Washington: Government Printing Office, 1961).

[47] Powell, ibid.; Hearings, ibid., pp. 12-13.

[48] Powell, ibid.; U.S. Congress, House, Committee on Interior and Insular Affairs, Indian Fractionated Land Problems, Hearings before the Subcommittee on Indian Affairs, 89th Cong, 2d sess. (Washington:

Government Printing Office, 1966).

[49] Williams, "Too Little Land, Too Many Heirs," pp. 724-25.

[50] Ibid.

[51] Ibid., pp. 725, 741-44.

[52] Ibid.; Langone, *The Heirship Land Problem*, p. 528.

[53] Williams, ibid.

[54] Senate, *Indian Heirship Land Problem, Hearings* (1961), p. 29.

[55] *Act of 26 October 1971, Statutes at Large* 88: 1468 (1971).

[56] Marvin Olson, interview.

[57] Draft of a Bill Pertaining to the Inheritance of Trust or Restricted or Fee Land on the Lake Traverse Reservation, North Dakota and South Dakota, and for other purposes.

Senator ANDREWS. Next we have Mr. Sidney Mills, the Director of the Office of Trust Responsibilities, Bureau of Indian Affairs, accompanied by Mr. Louis White, realty officer.

Mr. Mills, I understand you have a statement for the record?

Mr. MILLS. Yes; we do, Mr. Chairman.

Senator ANDREWS. Without objection, it will be inserted into the record following your oral testimony.

Mr. Mills, as I understand it, your testimony acknowledges that there are provisions in this bill that are not included in the Indian Land Consolidation Act and that are not covered elsewhere in existing law. It does not appear that the Department opposes most of these provisions, though you do recommend technical amendments.

Does the Department have any objections to partitionment, eminent domain, and estate tax as a matter of policy?

TESTIMONY OF SIDNEY L. MILLS, DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY MR. LOUIS WHITE, REALTY OFFICER, AND THORNTON W. FIELD, ASSISTANT SOLICITOR, LANDS AND MINERALS DIVISION

Mr. MILLS. Mr. Chairman, I don't think so.

Senator ANDREWS. But the primary basis for the Department's opposition to this bill appears to be that the Indian Land Consolidation Act provides authority for tribes to adopt inheritance codes similar to, if not identical to, the provisions of this bill. Do you agree that the Indian Land Consolidation Act does not authorize the Sisseton-Wahpeton Tribe to enact the provisions for inheritance that are contained in this bill?

Mr. MILLS. It would help, but not to the extent, Mr. Chairman, that they would like.

Senator ANDREWS. There are already a number of Federal statutes setting forth inheritance laws for specific tribes, and the Indian Land Consolidation Act authorizes other tribes to adopt their own inheritance codes.

Would you agree, Mr. Mills, that enactment of this particular bill would really have only a minimal impact on the laws that currently govern Indian inheritance?

Mr. FIELD. As Mr. Mills pointed out earlier, the problem the Department has is not really with the specifics of the bill because the Department really does not have any background information to understand why this tribe's problems may be unique and create problems that the Indian Land Consolidation Act may not address.

The real problem that the Department has is that the reason the Indian Land Consolidation Act was passed was to prevent the Congress from having to address, on a yearly basis, these types of problems pursuant to individual bills for individual tribes. Our suggestion to the committee is that if it is determined that the Indian Land Consolidation Act is not broad enough or does not give tribes sufficient authority to do the types of land consolidation and inheritance—cure the types of land consolidation or inheritance problems that they see, that the better vehicle would be to amend the Indian Land Consolidation Act. That would provide uniform provisions for all tribes and make it easier for the Department to administer than to do it on a piecemeal, individual tribal legislative initiative.

Senator ANDREWS. That act, as you know, is presently before us for a technical amendment. Has the Department prepared an amendment or amendments that would move toward the goals you just stated?

Mr. FIELD. We have not, but we would certainly be willing to work with the committee to arrive at amendments to cure any problems that it has run into in oversight hearings.

Senator ANDREWS. Let this serve as your invitation to do it at the closest time possible.

Mr. FIELD. As you are aware, we are still working on regulations and guidelines to implement the Indian Land Consolidation Act. We would caution that we do not have a great deal of experience in working with it yet, and it might be appropriate to give us an opportunity to work with it for a while, to get regulations on the books, to see how far it goes or does not go.

Senator ANDREWS. Well, the forum that we now have, of course, is HJR-158 that does make, as I say, technical amendments for the Land Consolidation Act. We have had one hearing on it, as you know, and we hope to have another later this session; in order to hold an additional hearing we will expect, then, the Department's cooperation in developing additional amendments to cure the problems that have been raised. Can we, Mr. Mills, expect that?

Mr. MILLS. Yes, sir.

Senator ANDREWS. Good.

Thank you very much. We appreciate the attendance of all of you.

[The prepared statement follows:]

PREPARED STATEMENT OF SIDNEY L. MILLS, DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Committee, I am here today to present the views of the Department of the Interior on S. 2663, a bill "Pertaining to the inheritance of trust or restricted land on the Lake Traverse Indian Reservation, North Dakota and South Dakota, and for other purposes."

We oppose enactment of S. 2663 for the reasons stated herein.

The subject legislation was introduced at the request of the Sisseton-Wahpeton Sioux Tribe of North Dakota and South Dakota to address the acute fractionated heirship problems which exist among its members.

The serious problem of fractionated heirship results where the heirs or devisees of allotment owners received an undivided interest in the allotment. Through the generations, upon the death of successive heirs or devisees, ownership passed to scores or hundreds of individuals, resulting in numerous tracts of land too small or unproductive to be an economic unit. The fractionated ownership patterns also make it very difficult, if not impossible, to utilize the land to the economic benefit of any of the owners.

In years prior to the enactment of the Indian Land Consolidation Act on January 12, 1983 (96 Stat. 2517; 25 U.S.C. 2201 et. seq.), a number of tribes had requested and received special legislative authority to carry out land consolidation programs. However, the Land Consolidation Act has provided a single comprehensive law governing land consolidation.

Although we understand the tribe's desire to solve its fractionated heirship problems, we feel that this can be accomplished under the provisions of the Indian Land Consolidation Act. Deviation from that Act could mean additional complexities, and, as a result, increased costs.

First of all, we note that S. 2663 contains essentially the same provisions as H.R. 8418, a bill which was introduced late in the second session of the 96th Congress at the request of the Sisseton-Wahpeton Tribe. However, since the 96th Congress adjourned shortly after H.R. 8418 was introduced, no action on the bill was taken.

We are not certain, at this time, why the tribe feels that this legislation is still necessary in light of the enactment of the Indian Land Consolidation Act (25 U.S.C. Section 2201, et. seq.). We do not see the need for the Sisseton-Wahpeton Tribe to seek their own legislation. The Indian Land Consolidation Act (25 U.S.C. 2203) authorized any tribe, with the approval of the Secretary, to adopt a land consolidation plan for the purpose of eliminating undivided fractional interests. Additionally, 25 U.S.C. 2205 allows an Indian tribe, with the approval of the Secretary, to pass an ordinance barring non-members or non-Indians from inheritance by devise or descent. Thus, it would seem that what the tribe hopes to accomplish by this special legislation could be accomplished through ordinances.

SECTION-BY-SECTION ANALYSIS OF S. 2663

Generally, the intents and purposes of sections 1–6 of S. 2663 are basically covered within the provisions of the Indian Land Consolidation Act (ILCA) (Public Law 97-459, Title II). The slight variances would serve only to create additional multiplicity of Indian inheritance laws which the ILCA sought to stem by providing a uniform method to accomplish like objectives which are contained in the ILCA and S. 2663.

Section 1 of S. 2663 clarifies the intent and purpose of this Act, which is to provide the Sisseton-Wahpeton Sioux Tribe an Act which shall govern the right to inherit trust or restricted land located within such states and within the original exterior boundaries of the Lake Traverse Indian Reservation which was established by the Treaty of February 19, 1867 (15 Stat. 505).

This section also provides that the provisions of this Act shall apply only to estates of decedents whose deaths occur on or after the date of enactment of this Act.

Section 2 provides that only the Sisseton-Wahpeton Sioux Tribe of North Dakota and South Dakota or persons who are enrolled members of the tribe shall be entitled to receive by devise or descent any interest in trust or restricted land within the reservation except as provided in section 4 of this Act.

Section 3 provides for the descent and distribution of trust or restricted land whenever any person dies possessed of any such land which has not been devised by a will approved by the Secretary of the Interior pursuant to section 4 of the Act of June 25, 1910 (36 Stat. 856), as amended (25 U.S.C. 373) or such land which has not been devised by a will which is consistent with the provisions of section 2 of this Act. The ILCA (25 U.S.C. 2205) would allow the tribe to pass a similar ordinance regulating inheritance. Although, admittedly, ILCA is not quite as broad in scope as this provision in S. 2663.

Section 4(b) of S. 2663 refers to interstate situations which are already provided for by 25 U.S.C. Sec. 2205(1). A surviving non-member spouse is entitled to inherit a life estate only, however, there are no provisions for the children of the non-member spouse to inherit trust land when the surviving spouse dies.

Section 4(d)(1) of S. 2663 appears to be in total conflict with the administration of heirship lands by the Bureau of Indian Affairs. No heir of fractionated heirship land now has the exclusive right to determine the use of the property, thus we do not see how this provision could provide for such by a mere life tenant who has no ownership interest.

Section 4(d)(2) of S. 2663 presupposes that the decedent was the sole owner of the interest descending to the spouse and children, since it states the spouse is entitled to one-half of the income from the lease. Technically, it is one-half of whatever the decedent's share of the title to the land would have been, which does not necessarily equate to one-half of the income from the lease. The meaning of "non-member children" is unclear.

Section 4(d)(3) of S. 2663 differs from normal descent and distribution statutes. The words "such children and issue of deceased children shall be entitled to equal shares" are contrary to present statutes. The provision does not provide for right of representation by the decedent's grandchildren of their deceased parent's share, but appears to give grandchildren an equal share with the living children of the decedent.

Section 5(a) of S. 2663 ignores the fact that a person's inherited interest is an undivided interest and cannot be measured in terms of acreage. For example, a person inheriting a 1/40th interest in an 80-acre parcel acquires a 1/40th interest in each and every one of the 80 acres; however, the 1/40th interest is equivalent to 2 acres of an 80-acre tract. Although it is equivalent to, it is not the same. The concept in section 5(a) is unnecessary since we already have an escheat statute which directly benefits the tribe (Section 207 of the Indian Land Consolidation Act). Additionally, we do not see the significance of not allowing the escheat section to apply to land located within a municipality. We can see all kinds of problems here with respect to determining whether a tract of land is located within a municipality without some further means of definition or explanation of municipality.

Section 6 of S. 2663 provides for the escheat of interests (which cannot pass to an ineligible heir or devisee) without payment or compensation to said heir or devisee. This section is essentially the same as 25 U.S.C. Section 2205(3) which provides for payment of the fair market value of such interest or the granting of a life estate.

Section 7(a) of S. 2663 deals with the problems of partitionment which can be somewhat alleviated by the new Indian Land Consolidation Act, 25 U.S.C. Section 2204 or are covered by existing partition statutes. The partitionment of land as proposed by S. 2663 may create many more problems than it is attempting to solve as S. 2663 would mandate the partition of land without regard to the lands usefulness after partition. If S. 2663 is enacted, we would recommend that the language in that portion reading "partition the allotment to the advantage of the person requesting the partition," be changed to "partition the allotment to the advantage of all the heirs."

Section 8 is a general eminent domain provision that has no counterpart under existing law. At present, tribes cannot condemn allotments because of the anti-encumbrance provision of 25 U.S.C. 348, and because the United States, as fee owner, is an indispensable party and has not waived its sovereign immunity to such suits. The closest existing statute is section 2204 of the ILCA. That section is a limited eminent domain provision and allows the taking of allotted lands by tribes under certain circumstances.

Section 9 is essentially the same as 25 U.S.C. 2202 (ILCA).

Section 10 of S. 2663 provides for the imposition of a tax against the estate of any person. There is no counterpart for this section in existing law. At present, because of the anti-encumbrance provision of 25 U.S.C. 348 no taxes are allowed to be levied against trust property. If this section is to be enacted, it needs to be clarified. The Department only probates trust assets. The tax, however, is against the estate as a whole. Is the estate tax to be collected only from the trust assets?

Section 11 of S. 2663 attempts to create some kind of a "presumption of death" situation. First of all it attempts to have the property of a person presumed to be deceased escheat to the tribe without any consideration being given to the person's probable heirs at law under the intestate succession statutes. Why the tribe feels that they should have the property escheat to them rather than have it go to the person's heirs is certainly unclear. The bill fails to mention the mechanics by which the escheat provision is to occur. The use of the word "unknown" for seven consecutive years is a very vague and uncertain term. It appears to be an attempt to condense the numerous elements of a presumption of death situation down to one word, which cannot be done. The proviso under section 11(a) creates an almost impossible situation, that is, to set up a 90-day period immediately after the expiration of a 7-year period. It is impossible to know when a 7-year period is going to occur; therefore, how can you establish a 90-day period from that date? Additionally, this section provides that the agency of the United States having custody and control of the property must use due diligence to locate the rightful owner and "restore" the owner to possession. This does not make sense, since the rightful owner is the beneficiary of the trust relationship with the United States and may never have been in control (or possession) of the property which the United States holds in trust.

Section 12 is identical to 25 U.S.C. 2210.

Section 13. Since the bill was drafted by the tribe, we have no way of knowing the intent of some of the provisions. It should be the tribe's responsibility to explain it to its members.

Section 14 appears to make wills executed prior to or within 120 days of enactment effective notwithstanding passage of the act. Presumably, this is to give a grace period to members so that wills can be amended to comply with the Act.

This concludes my prepared statement. I would be pleased to answer any questions you or members of the Committee may have.

Senator ANDREWS. I think we have complied a record on both of these bills.

Thank you all for attending.

This hearing is adjourned.

[Whereupon, at 11:05 a.m. the hearing was adjourned.]

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